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No. 82-751

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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THE INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNIONS NOS. 141, 229, 681, and 706,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Whether § 14(b) of the National Labor Relations Act permits the states to make unlawful an agreement between an exclusive bargaining representative and an employer requiring nonmembers within the bargaining unit to pay a fee limited to their pro rata share of the costs for "enforcing and servicing the collective bargaining agreement"—services that federal law requires the exclusive bargaining representative to provide to nonmembers as well as to members.

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*Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706 (hereinafter collectively referred to as "the Union") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706 v. N.L.R.B.*, 675 F.2d 1257.

## OPINIONS BELOW

The decision and order of the National Labor Relations Board in this case and the decision of the Administrative Law Judge are reported at 252 NLRB 1299, and are reprinted in the separately bound appendix to this petition as Appendix C and Appendix D. The decision of the court of appeals from which a writ of certiorari is sought is reported at 675 F.2d 1257, and is reprinted as Appendix A.

## JURISDICTION

The court below issued its opinion and judgment in this case on April 16, 1982. That court issued an order denying a timely petition for rehearing on June 2, 1982. (A copy of that order is reprinted as Appendix B (54a)). On August 24, 1982, Chief Justice Burger entered an order extending the time for filing this petition to and including October 15, 1982. (A copy of that order is reprinted as Appendix E (82a)). On October 10, 1982, Chief Justice Burger entered an order further extending the time for filing this petition to and including October 30, 1982. (A copy of that order is reprinted as Appendix F (84a)). This Court has jurisdiction to review the judgment of the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 8(a)(3) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 158(a)(3), provides as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United

States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. . . .

Section 8(b)(3) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 158(b)(3), provides as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . .

Section 14(b) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 29 U.S.C. § 164(b), provides as follows:

(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

## STATEMENT OF THE CASE

### A. The Facts

In 1974, Local 681, the exclusive bargaining representative for pipefitters at the International Paper Company's (hereinafter "the Company") plant in Natchez, Mississippi, added an annual assessment to the then existing union dues. In response to that additional assessment, Local 681's membership at the Natchez plant declined from 38 to 1, and the remaining member was not required to pay any dues by virtue of his position as shop steward. Despite the loss of all dues paying members at the Natchez plant, Local 681 was still required to meet all of its statutory representational responsibilities as exclusive representative of the pipefitters at that plant. And, in fact, Local 681 expended thousands of dollars in meeting those responsibilities during the period when none of the pipefitters at the Natchez plant was paying dues.

In May of 1977, the Union opened negotiations with the Company for a new contract. These negotiations covered pipefitters at the Company's plants in Louisiana, Florida, and Arkansas, as well as the Natchez, Mississippi plant. In an effort to address the problem that was so graphically illustrated by the Natchez situation, the Union proposed the following clause (App. 3a-4a):

> The costs and expenses of representing all members of the bargaining unit, without regard to union affiliation or lack of same must be borne by all bargaining unit employees.
>
> Those unit employees who voluntarily choose not to become union members shall be required to contribute a pro-rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. The representation fee will apply only when a collective bargaining agreement is in effect. Furthermore, in no case will the fee exceed the dues and assessments required of union members.

> Failure of any *permanent* employee to make payment of the representation fee each month and to maintain the payments during employment under this agreement shall constitute grounds for dismissal after ten (10) days written notice to the employee and the company.
>
> The amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process. . . .

The Company and the Union reached agreement on all other contract provisions, but the Company rejected the above-quoted clause as violative of the right-to-work laws of Arkansas, Florida, Louisiana, and Mississippi.[1] The Union informed the Company that without the "repre-

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[1] Ark. Stat. Ann. § 81-202 provides in pertinent part:

> No person shall be denied employment because of membership in, or affiliation with, a labor union . . . nor shall any person unless he shall voluntarily consent in writing to do so, be compelled to pay dues, or any other monetary consideration to any labor organization as a prerequisite to, or condition of, or continuance of, employment.

Fla. Const. Art. I § 6 provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor organization.

See *Florida Education Ass'n. v. Pub. Empl. Rel. Com.*, 346 So.2d 551 (Fla. App. 1977) (construing Art. I § 6 to prohibit a requirement that nonunion members pay their pro rata share of bargaining and grievance costs).

La. Rev. Stat. Ann. § 23:983 provides:

> No person shall be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees, assessments, or other charges of any kind to a labor organization.

Miss. Const. Art. VII and Miss. Code Ann. § 71-1-47 provide:

> No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

sentation fee" clause there would be no agreement, and further advised the Company of its intention to commence picketing at the Natchez plant. Thereupon, the Company filed an unfair labor practice charge, alleging that the Union had insisted to the point of impasse upon a clause violative of the "right-to-work" laws of the four states mentioned above in violation of § 8(b)(3) of the National Labor Relations Act (hereinafter "the Act").

### B. Proceedings Below

At the hearing upon the Company's unfair labor practice charge, the administrative law judge ruled that the "representation fee" clause in question would be lawful under § 8(a)(3) of the Act and would, in the absence of the right-to-work laws, be a mandatory subject of bargaining. The ALJ further ruled, however, that § 14(b) of the Act permits the states to prohibit "representation fees" of the type sought by the Union, and that the four states involved here had enacted such prohibitions. Accordingly, the ALJ found the Union by insisting to the point of impasse on the "representation fee" clause to have violated § 8(b)(3), and issued recommended relief for that violation. A three-member panel of the National Labor Relations Board (hereinafter "the Board") affirmed the ALJ's opinion and adopted his recommended remedy.

The Union filed a petition for review of the Board's decision in the District of Columbia Circuit, and the Board filed a cross petition for enforcement of its order. The court granted enforcement of the Board's order, with Judge Mikva dissenting. The majority recognized that the issue presented by this case is one left open in *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 746. (App. 9a). But the majority concluded that the rationale by which the Court in *Schermerhorn* decided that an agency shop—requiring employees in the bargaining unit who are not union members to pay an amount equal to union dues—is subject to state prohibition under § 14(b), would

require the same result where a union seeks to charge non-members a fee, less than union dues, for services rendered to them in "enforcing and servicing the collective bargaining agreement." (App. 3a, 9a-10a). The majority also pointed to legislative history showing that Congress intended § 14(b) to permit the states to prohibit "compulsory unionism" as supportive of the result reached below. (App. 6a-8a). Judge Mikva in dissent, reviewed at length the legislative history of § 14(b), this Court's decisions, and the decisions of other circuits in related cases and reached the opposite conclusion.

## REASONS FOR GRANTING THE WRIT

The question presented in this case, concerning the legality in "right-to-work" states of a clause in a collective bargaining agreement requiring employees who are not union members to pay a fee, less than union dues, for services rendered to them in "enforcing and servicing the collective bargaining agreement," is, as the court below recognized, a question left open by this Court (App. 9a):

> The Union's 'representation fee' is a 'less stringent union-security arrangement' than the fee in [*Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746] because it is not set to equal union dues. The representation fee thus escapes *Schermerhorn's* holding. . . .

It is also a question of great import in labor management relations. For federal law imposes on exclusive bargaining representatives heavy obligations running to all employees in the bargaining unit, and the costs of meeting those obligations are substantial. To require a union to, for example, process a grievance for an employee without providing the union a means to require that employee to pay his share of the attendant costs is

either to place the entire financial burden of processing that grievance on the union's members who are not directly involved or in the long run to jeopardize the union's ability to serve as an exclusive collective bargaining representative. The first of these consequences is inequitable and tends to discourage the exercise of the § 7 right to form and join labor organizations. The second of these consequences is squarely contrary to the national labor policy, as stated in § 1 of the Act, to encourage the practice and procedure of collective bargaining. And, as we show, this important question was wrongly decided below.

1. In *Schermerhorn*, the Court dealt with a contract clause that imposed on nonmembers within the bargaining unit "the obligation to pay initiation fees and regular dues [which] is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment' "—a clause the Court termed an " 'agency shop' arrangement." 373 U.S. at 751. Because of this practical equivalence, the Court held that "[w]hatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b)" (*id.* at 751-752) and may pursuant to the permission stated in that section be prohibited by state law.

The union in that case "belatedly" had made an attempt to characterize the nonmember payments involved in that case as merely a fee for costs incurred by the union in meeting its legal obligations as exclusive bargaining agent. *Id.* at 752. The Court rejected that belated characterization as unsubstantiated by the record in the case. The Court pointed out that the nonmember fees could be used directly to finance the union's "institutional" expenditures as well as its collective bargaining expenses. And even if that were not true, the Court concluded that nonmembers would necessarily be compelled to contribute to "institutional" expenses of the union: "the service

fee is admittedly the exact equal of membership initiation and monthly dues"; and "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining' "; therefore, "collective bargaining services [would] cost the nonmember more than the member" and "[b]y paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Id.* at 753-754.

The clause at issue in the instant case is entirely distinct from the *Schermerhorn* clause in all the foregoing respects. The clause proposed by the Union here requires nonmembers only "to contribute a pro-rata share of the costs and expenses directly related to enforcing and servicing the collective bargaining agreement." App. 3a. And "[t]he amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process." App. 4a. Except in the entirely unlikely event that the independent audit showed the union to have no expenses other than those attributable to enforcing and servicing the collective agreement, the representation fee would be less than dues; and, in no event could the nonmember's contribution be used for expenses other than the expenses of enforcing and servicing the agreement. The clause here is thus *not* "the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.' " 373 U.S. at 751. It is, in the words of *Schermerhorn*, a "less stringent union-security arrangement" than the agency shop. *Id.* at 752.

2. The decision below is of great practical importance to all unions functioning in the 20 "right-to-work" states. As Judge Mikva pointed out in dissent below, this Court has in a series of decisions held that a union's election as exclusive bargaining agent carries with it a statutory duty

"to represent all employees in the bargaining unit, whether union or nonunion. See e.g. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564-65 . . .; *Humphrey v. Moore*, 375 U.S. 335, 342. . . ." App. 14a. See also, *Vaca v. Sipes*, 386 U.S. 171; *Steele v. Louisville & N.R. Co.*, 323 U.S. 192. As the record in this case shows, meeting that statutory duty, in enforcing and servicing the collective bargaining agreement—particularly in the grievance arbitration process—requires unions to incur significant monetary expenses. And, as the record also shows, workers no less than anyone else are tempted by the prospect of getting valuable guaranteed services for nothing.

If unions are required by federal law to provide such services to nonmembers, but at the same time cannot require nonmembers to pay for the services, unions will, at the least, be hampered in their ability to meet their federal law obligations. And the result may well be that some unions in right-to-work states will not be able to provide either members or nonmembers the quality of services contemplated by the federal labor laws. Certainly the result will be to shift inequitably the cost of providing such services as are required for nonmembers to the union's members. This Court should determine whether Congress in enacting § 14(b) meant to bring about such untoward results.

3. There is strong evidence in the legislative history that Congress meant no such result. Judge Mikva's dissent reviews the legislative materials in full, and we set out here for the Court's convenience the essence of his conclusions (App. 32a-37a, footnote omitted):

> By enacting section 14(b) in 1947, Congress reiterated the point that it had not been the intention of the [1935] Congress "to override State laws regulating the closed shop." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947).
>
> • • • •

[T]he predominant if not the only purpose of section 14(b) was to provide yet one more check on the abuses that could exist under "compulsory unionism."

The crucial point to be drawn from the legislative history of section 14(b), however, is that Congress never specifically defined what it meant by "compulsory unionism." . . .

The best evidence of the congressional intent may therefore lie in the kinds of "compulsory unionism" that members of Congress understood had been banned by the state right-to-work laws. . . .

* * * *

[I]n the [House and] Senate, the emphasis was on state laws prohibiting the closed shop. [For example] Senator Taft defended the section 8(3) proviso, noting that it "did not in any way prohibit the enforcement of State laws which already prohibited closed shops." *Id.* at 6520. His summary of the bill explained that section 14(b) would allow states to prevent "compulsory union membership agreements" where such agreements violated state laws. . . . At no time, in the committee reports or during the debates, was it intimated that "compulsory unionism" meant anything more than the closed shop, union shop, and conceivably contracts requiring maintenance of membership or preferential hiring of union members.

One final observation, if an obvious one, should be made about the legislative history of section 14(b). The debates make it clear that Congress knew that several states had banned the closed and union shop, but the legislative history does not suggest that Congress knew these laws sometimes prohibited payment of "any dues, fees or charges of any kind to any labor union" as well. Congress emphatically did not intend to give the states a free hand in amending federal labor law. . . .

* * * *

Had Congress chosen, it could have framed section 14(b) in terms identical to existing state right-to-work laws. Employers could have been precluded from making agreements "requiring membership in or payments of any kind to a labor organization," rather than those simply "requiring membership in a labor organization." On its face, section 14(b) is by no means as broad as the more restrictive state laws that the majority opinion now suggests it incorporated. Congressional attention focused on closed shops and union shops, which were said to place workers at the mercy of capricious or corrupt treatment by labor organizations. Section 14(b) was meant to extend associational freedom to employees in states that had passed legislation dealing with this subject. But the Taft-Hartley Act did not adopt the philosophy that labor unions should be destroyed. Nothing in the legislative history of section 14(b) suggests that Congress meant to give this power to the states.

4. The decision below is inconsistent with the theory of the decisions holding that service fees charged to non-members by union-operated hiring halls do not violate the core prohibition of § 8(a)(3).

*Schermerhorn* establishes that § 14(b)'s purpose is to expose to state prohibition arrangements that can pass muster under § 8(a)(3) solely because they satisfy the requirements of § 8(a)(3)'s *proviso—i.e.*, arrangements that violate the core prohibition of § 8(a)(3) ("discrimination . . . to encourage or discourage [union] membership") but that are preserved as valid by the proviso which sanctions "agreement[s] . . . to require as a condition of employment membership" in the union. 373 U.S. 751. In the hiring hall context, a service fee charged to non-members by a union operated hiring hall has been held not to "encourage or discourage" union membership and hence not to violate the core prohibition

of § 8(a)(3). *Local 825, IUOE*, 137 NLRB 1043 (1962); *Local 1351, Steamship Clerks v. NLRB*, 329 F.2d 259 (D.C. Cir. 1964), *cert. denied*, 372 U.S. 993; *NLRB v. Local 138, IUOE*, 385 F.2d 874 (2nd Cir. 1974).[2] Under *Schermerhorn* then, such fees are not within the ambit of § 14(b)'s permission to the states to invalidate certain union security arrangements.

By the same analysis, the representation fee in the instant case does not violate the core prohibition of § 8(a)(3), for it does not encourage or discourage union membership. Under the clause proposed by the Union in the instant case, nonmembers would pay only for services that the union must provide on an even-handed basis to all employees without regard to union membership, and the amount nonmembers would pay would be less than Union dues. Unlike the situation where the full payment of dues is required, in which case an employee would be encouraged to join the Union in order to take full advantage of his payment, here an employee would have to pay an additional amount to become a member and thus would have no more incentive to join the Union if the fee were charged than if there were no fee. Thus, like the service fee in the hiring hall context, the representation fee here is outside the ambit of § 14(b).

---

[2] The majority below sought to distinguish the hiring hall cases on the ground that § 14(b) is concerned only with the treatment of employees after hire, while the arrangements involved in those cases related to pre-hire treatment. The distinction rests on a false premise, for Congress clearly intended that § 14(b) would invest the states with jurisdiction (concurrent with the NLRB's) to outlaw the *closed shop*—an arrangement that requires union membership *prior to hire*. See H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong., 1st Sess., 60 (1947). It is thus not correct that § 14(b) is unconcerned with pre-hire conditions, and the hiring hall decisions cannot be distinguished on that ground.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 80-2393

THE INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNIONS NOS. 141, 229, 681, AND 706,
*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

---

Petition for Review of an Order of the National Labor Relations Board

---

Argued October 29, 1981

Decided April 16, 1982

*Louis Robein* for petitioner. *Jerry L. Gardner, Jr.* was on the brief for petitioner.

*David A. Fleischer*, Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, was on the brief, for respondent.

*Rex H. Reed* and *Richard J. Clair* were on the brief for *amicus curiae* National Right to Work Legal Defense Foundation, Inc., urging affirmance.

Before: J. EDWARD LUMBARD,* *Senior Circuit Judge* for the Second Circuit, ROBB and MIKVA, *Circuit Judges.*

Opinion for the court filed by *Senior Circuit Judge* LUMBARD.

Dissenting opinion filed by *Circuit Judge* MIKVA.

LUMBARD, *Circuit Judge*: In bargaining for a renewal of labor management contracts in four right-to-work states, the Union [1] insisted on clauses assessing non-union employees for the costs of union representation. International Paper Co. (the Company) responded that, in those states, such clauses were illegal under right-to-work laws. The National Labor Relations Board (NLRB) found that such clauses were not a mandatory subject for bargaining, and therefore insistence on the clauses was an unfair labor practice. 252 NLRB 181, [1980-81] CCH NLRB ¶ 1[illegible]3 (1980). The Union petitioned for review and the NLRB cross-petitioned to enforce its order. We grant enforcement of the Board's order.

The facts were found at an administrative hearing, Schlesinger, *A.L.J.*, and are not disputed on appeal. Pipefitters at company plants in Springhill, La., Panama City, Fla., Natchez, Miss., and Camden, Ark. belong to Union Locals in the four states. Costs of union administration are borne by the locals; costs of negotiating a contract traditionally have been split between the locals and the international union. In 1974, Local 681 in Mississippi added a yearly assessment of two percent of wages to the existing union dues of $8.25 per month. Pipefitters at the Natchez, Miss., plant quit the Union rather than pay the assessment. Local 681's member-

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706.

ship in Natchez declined from 38 to 1, the last member being the shop steward who by virtue of his position was not required to pay dues.[2] Of course, Local 681 remained obligated to represent the Natchez pipefitters even though none of them paid dues.[3] *Abood v. Detroit Board of Education*, 431 U.S. 209, 221-22 (1977); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 760-61 (1961).

When the Union opened contract negotiations with the Company in May 1977, it proposed clauses levying "representation fees" on non-member pipefitters. The Union's final draft of the clauses was:

> The cost and expenses of representing all members of the bargaining unit, without regard to union affiliation or lack of same must be borne by all bargaining unit employees.
>
> Those unit employees who voluntarily choose not to become union members shall be required to contribute a pro-rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. The representation fee will apply only when a collective bargaining agreement is in effect. Furthermore, in no case will the fee exceed the dues and assessments required of union members.
>
> Failure of any *permanent* employee to make payment of the representation fee each month and to maintain the payments during employment for dismissal after ten (10) days written notice to the employee and the company.

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[2] The other locals did not have similar problems. Locals 141 and 229 retained all of their members. Only two of 29 pipefitters represented by Local 706 refused to pay dues.

[3] Judge Schlesinger suggested that the Union could disclaim any interest in representing the Natchez employees. The Board did not consider this point on appeal, and neither party has raised the issue here.

> The amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process. . . .

The Union and the Company reached agreement on all other contract provisions, but on September 28, 1977, the Company rejected the representation fee clauses on the grounds that they violated the right-to-work laws of Arkansas, Florida, Mississippi, and Louisiana.[4] On October 17, the Union wrote to the Company to insist on the clauses, and to announce that picketing would commence at Natchez on October 31. The Company then filed its unfair labor practice charge.

At the NLRB hearing, Judge Schlesinger ruled that representation fees were permissible under § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which says:

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[4] Ark. Stat. Ann. § 81-202 provides in part that "No person shall be denied employment because of membership in, or affiliation with, a labor union . . . nor shall any person unless he shall voluntarily consent in writing to do so, be compelled to pay dues, or any other monetary consideration to any labor organization as a prerequisite to, or condition of, or continuance of, employment."

La. Rev. Stat. Ann. § 23:983 provides that "No person shall be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees, assessments, or other charges of any kind to a labor organization."

Miss. Const. Art. VII and Miss. Code Ann. § 71-1-47 provide that "No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization."

Fla. Const. Art. I § 6 provides that "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in a labor organization." This provision was construed to prohibit an agreement requiring nonunion members to pay their pro-rata share of bargaining and grievance costs, *Florida Education Ass'n v. Pub. Empl. Rel. Com.*, 346 So. 2d 551 (Fla. App. 1977).

> It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement. . . .

But Judge Schlesinger then concluded that the representation fees were banned by the right-to-work laws of the four states under § 14(b) of the NLRA, 29 U.S.C. § 164(b), which provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

The Union argued that fee-for-service clauses are the equivalent of "membership in a labor organization" under § 8(a)(3) but not under § 14(b). Such clauses, the Union claimed, are necessary to prevent "free riders" such as the Natchez employees. Judge Schlesinger concluded, however, that by passing § 14(b) Congress had deliberately allowed the States to make their own judgment on the issue of "free riders." He held that the representation fee clauses were prohibited by State law under § 14(b), and the Union committed an unfair labor practice under § 8(a)(3) by bargaining to impasse for the clauses. The Board adopted Judge Schlesinger's opinion that § 14(b) permitted states to ban representation fees and ordered the Union to cease violating § 8(a)(3)

by its insistence on the fees; whereupon the Union petitioned for review and the Board cross-petitioned for enforcement.

The legislative history of the Taft Hartley Act of 1947 which enacted § 14(b), clearly supports the Board's ruling. Congress knew precisely what state laws it was validating when it passed § 14(b). *See Air Transport Ass'n of America v. Professional Air Traffic Controllers Organization*, 667 F.2d 316, 321 (2d Cir. 1981). The House report listed each state which had passed a right-to-work law or constitutional provision. H.R. Rep. No. 245, 80th Cong., 1st Sess. 34, *reprinted in* I *Legislative History of the Labor Management Relations Act of 1947* 324 (1948). Among the enactments noted was the Arkansas statute at issue in this case. Another was the Georgia statute, Law No. 140 §§ 3-4, 1947 Ga. Laws 616, 618 (March 27, 1947) (codified as Ga. Code §§ 54-903-04 (1978)):

> § 54-903—No individual shall be required as a condition of employment or continuation of employment to pay any fee, assessment or any other sum of money whatsoever to a labor organization.
>
> § 54-904—Any provision in a contract between an employer and a labor organization which requires as a condition of employment, or continuation of employment, that any individual . . . pay any fee, assessment or other sum of money whatsoever to a labor organization, is hereby declared to be contrary to the public policy of this state.

The Mississippi statute at issue here is almost identical to the Georgia statute above, which Congress practically incorporated by reference into the legislative history of § 14(b).

Congress also knew about the free rider problem posed by such laws when it sanctioned such laws by passing § 14(b), as the report of the Senate Committee shows:

> A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. . . . [A]buses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court [citation omitted] it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce [citations omitted]. In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

Report of the Senate Committee on Labor and Public Welfare presented by Senator Taft, 80th Cong., 1st Sess. 6, April 17, 1947, *reprinted in* I *Legislative History*, *supra*, at 412. Senator Taft reported his bill, S. 1126, one week after Representative Hartley introduced H. 3020, whose § 13 was the textual precursor of the Taft-Hartley Act's final § 14(b). Although the original Senate bill did not contain § 14(b), Senator Taft and Representative Hartley were of one mind on federal preemption of state law. On June 5, 1947, Senator Taft explained the future § 14(b) to his peers as follows:

> Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal. As stated in the report accompanying the Senate committee bill, it was not the intent to deprive the States of such power.

Cong. Rec. S 6602, *reprinted in* II *Legislative History, supra*, at 1543. Senator Taft added, "All we have done is to write in expressly what our committee report said." *Id.* at 6604, *reprinted in* II *Legislative History, supra*, at 1546.

Congress knew of the free rider problem; it knew of the state laws at issue here; it passed § 14(b) anyway. President Truman's veto message specifically criticized § 14(b): "The bill's stated policy of preserving some degree of union security would be abdicated in all states where more restrictive policies exist." Cong. Rec. H 7503, *reprinted in* II *Legislative History, supra*, at 920-21.[5]

In short, the legislative history of § 14(b) supports the position of the Board. So does the Supreme Court. On June 3, 1963, the Court held that an "agency shop" agreement, requiring non-members to pay union dues, was the equivalent of membership under § 8(a)(3) and therefore permissible under the NLRA. *NLRB v. General*

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[5] The dissent insists that in passing § 14(b) Congress intended state regulation only of closed or union shops. But President Truman's veto message complained that § 14(b) allowed the states to ban all forms of union security, and both friends and foes of the Taft-Hartley Act agreed with that assessment. Senator Murray's analysis of the bill concluded that "Section 14(b) . . . expressly provides that in the case where the State law covering union-security agreements is more rigorous than the policy expressed in the bill such State law shall be unaffected." Cong. Rec. S. 6665-66 (June 6, 1947, *reprinted in* II *Legislative History, supra*, at 1586. Senator Pepper said the section "leaves in effect all the strictures which any state may impose." Cong. Rec. S. 6678 (June 6, 1947), *reprinted in* II *Legislative History, supra*, at 1596. Senator Morse specifically objected to § 14(b) "which completely outlaws any form of the union shop in those States that have enacted laws abolishing or making illegal all forms of union security." Cong. Rec. S. 6613 (June 6, 1947), reprinted in II *Legislative History* at 1562. Clearly Congress equated membership with union security and considered the latter subject to state regulation. It is difficult to see how the agreement at issue can not be termed a union security agreement.

*Motors Corp.*, 373 U.S. 734 (1963). On the very same day, the Court held that because the agency shop was the equivalent of membership under § 8(a)(3), it was for that reason the equivalent of membership under § 14(b) and therefore amenable to prohibition by state law. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963).

> The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. . . . Whatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b).

*Id.* at 751-52.[6]

The Union's "representation fee" is a "less stringent union-security arrangement" than the fee in *Schermerhorn* because it is not set to equal union dues. The representation fee thus escapes *Schermerhorn's* holding, but not its rationale as restated in recent dicta: "Section 14(b) simply mirrors that part of § 8(a)(3) which focuses on post-hiring conditions of employment." *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1980). *See also id.* at 427: "To summarize, §§ 8(a)(3) and 14(b) together exhaust the federal interest in the types of union-security agreements employers and unions may make. The closed shop

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[6] The *General Motors* and *Schermerhorn* cases neatly illustrate the Union's dilemma: the agreement at issue must concern "membership" to be a mandatory subject of bargaining under § 8(a)(3), but must not concern "membership" in order to avoid state regulation under § 14(b). The dissent attempts to avoid this dilemma by stating that the agreement is a mandatory subject of bargaining under § 8(d) as regulating relations between employer and employee or as settling any term or condition of employment. This line of reasoning holds that an agreement concerning employee-union relationships falls under the NLRA provision governing employer-employee relations but not under the NLRA provision governing union security agreements.

is absolutely prohibited. Any lesser security agreement, though consistent with federal interest is sanctioned only if it harmonizes with state policy." (Stewart, J., dissenting).

The Union argues that not every practice permitted under federal law may be forbidden by the States. The Union cites several circuit court decisions holding that non-discriminatory union hiring halls, permissible under § 8(a)(3), may not be prohibited by right-to-work laws under § 14(b). *Laborers Int'l Union of North America Local 107 v. Kunco, Inc.*, 472 F.2d 456 (8th Cir. 1973); *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965); *NLRB v. Houston Chap. Ass'n Gen'l Con.*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966). These cases are clearly distinguishable. The regulation of union "membership" permitted to the states under § 14(b) applies only to post-hiring union security arrangements. *Oil, Chemical & Atomic Workers, supra.*[7] Use of a union hiring hall precedes hiring, and therefore does not constitute "membership" under § 14(b). But the representation fees at issue here are clearly a post-hiring union-security arrangement. They fall within the ambit of § 14(b).

Section 14(b) allows states to permit free riders. The Union and the dissent complain that free riders pose more of a burden today than they did when § 14(b) was enacted, but that argument is better addressed to Congress than to this court. A state law valid under § 14(b) in 1947 is valid today, and there is no serious question but that Congress in 1947 intended laws like Mississippi's

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[7] *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407 (1977), held that § 14(b) did not permit Texas to ban an agency shop covering seamen. The Court reasoned that Texas law could only govern union-employee relations where employees worked in Texas, because regulation of union membership permitted by § 14(b) applied to union-employee relationships on the job, *after* the employee had been hired.

to survive federal preemption. Moreover, on the facts of this case Mississippi's right-to-work law protects precisely those liberties Congress allowed the states to preserve. The men at the Natchez plant once belonged to the Union. They fled the Union when it raised its tax upon their labor. The dissent argues that the Union can force these men to choose between paying the fees they fled, or losing their jobs—and this notwithstanding state laws to the contrary. This is precisely the "compulsory unionism" Congress had in mind when it passed § 14(b), and this is the core of membership the Supreme Court has interpreted § 14(b) to encompass.[8]

Enforcement granted.

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[8] If the Union can prove that every cent of union dues and fees is spent on collective bargaining, non-members will then pay exactly the same amount as members, yet the dissent would still hold that such a requirement is not the equivalent of membership.

MIKVA, *Circuit Judge, dissenting*: The specific question posed by this case is whether employees who are not members of a union can be required to pay their fair share of grievance costs and other collective bargaining expenses incurred by a union on their behalf without thereby becoming "members" of the union, as membership is defined by federal labor law. Congress has never addressed this question, and the Supreme Court has explicitly left it open. The answer given by the majority runs against the grain of federal labor policy and finds no support in the legislative history of the statute from which that answer is said to stem.

Stated more generally, the question presented by this case goes to the heart of the model of trade union democracy endorsed by Congress in the Wagner and Taft-Hartley Acts. Under this model, the representative selected by a majority of the employees in a bargaining unit is authorized to bargain with the employer on behalf of the entire unit. "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The subordination of individual interests is not complete, however. Congress has enacted innumerable provisions giving individual employees rights against unions and protecting employees from arbitrary union conduct. One such measure is section 14(b) of the Taft-Hartley Act, 29 U.S.C. § 164(b) (1976), which lets the states outlaw contracts requiring employees to become "members" of the union selected as the bargaining agent. Section 14(b) is thus part of a curious and delicate balance between the powers and duties of unions and the freedom of individual employees.

In recent years, the courts have firmed up one side of this balance by articulating the obligations owed by the exclusive bargaining representative to each employee

in the bargaining unit. Decisions such as *Vaca v. Sipes* have made it clear that the union is a necessary party in virtually any relationship between the employer and the employee. Even in right-to-work states, the union cannot refuse to represent individual workers whether or not they are members of the union. The union must press their grievances; it must defend their interests during arbitration and contract negotiation; it must not permit individuals to "opt out" of the contract negotiated for the bargaining unit as a whole.

These duties, and the liabilities for breaching them, have been elaborated by the courts rather than by Congress. It follows that courts must take these pronouncements into consideration when addressing the other side of the balance implicit in trade union democracy. Judicial expansion of union obligations provides strong reason for us to hold section 14(b) to its exact terms, and for being careful to read the statute and Supreme Court decisions interpreting it no more broadly than their language justifies. This is not a call for judicial circumvention of section 14(b), but for an understanding that the statute is only one element in a complex equation. If courts emphasize one side of that equation without a corresponding treatment of the other side, their decisions can only undermine the balance appropriately set by Congress. I respectfully dissent.

## I. The Union Predicament

To appreciate the importance of this case, it is necessary to focus on the bind in which the Union found itself in 1977 after the members of one of its locals stopped paying their dues. Local 681 had represented the pipefitters and helpers at mills of the International Paper Company (the Company) in Vicksburg and Natchez, Mississippi, since 1951. The members of Local 681 voted in 1972 to add "working dues," a fraction of the actual hourly earnings of individual workers, to the

dues already being assessed Union members at a flat monthly rate. But in 1974, the Local 681 members at the Natchez mill began refusing to pay both kinds of dues.

By 1976, Union membership at the Natchez mill had declined from 38 to 1, and even the remaining member was not required to pay dues by virtue of his position as shop steward. The Union was not decertified at the Natchez mill until July 1979. In the interim, however, Local 681 expended thousands of dollars representing the employees at the Natchez mill despite the fact that it received nothing in dues or fees from those employees during the same period.

This outlay by the Union reflected its statutory duty to represent all employees in the bargaining unit, whether union or nonunion. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564-65 (1976); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). This obligation arises from the fact that the union, as the exclusive bargaining representative of all employees, must serve the interests of all employees in the bargaining unit "without hostility or discrimination toward any." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). The duty was first recognized by the Supreme Court in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), in which a union whose constitution excluded blacks from membership sought a collective bargaining agreement that also would have excluded black firemen from service with the railroad. The duty of fair representation has grown enormously in scope since 1944, however, from avoiding racial discrimination to providing daily representation:

> The bargaining representative's duty . . . does not come to an abrupt end . . . with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new prob-

> lems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.

*Conley v. Gibson*, 355 U.S. 41, 46 (1957); *see Abood v. Detroit Board of Education*, 431 U.S. 209, 221-22 (1977). The National Labor Relations Board (NLRB) has repeatedly held that a union cannot lawfully refuse to process a grievance of an employee in the bargaining unit on the ground that he is not a union member. *E.g.*, *International Brotherhood of Electrical Workers, Local 1504*, 211 NLRB 580 (1974); *Locals 186, 381, 396, et al., affiliates of the International Brotherhood of Teamsters*, 203 NLRB 799 (1973); *United Steelworkers of America, Local 937*, 200 NLRB 40 (1972).

These decision have compounded the problem of "free riders"—employees who obtain the benefits of union representation while refusing to join the union and thereby support the cost of its activities. Fifty years ago, when the Wagner Act was passed, free riders simply benefitted from accomplishments that the union would have sought in any event, such as higher wages or improved working conditions. Today, free riders can invoke union efforts on their particular behalf, such as the prosecution of nonunion grievances and arbitrations, and thus affirmatively deplete the union's treasury. The difference is like that between the house guest who warms himself beside the fireplace, and the guest who demands that the thermostat be turned up. In short, the problem of free riders has become more pronounced as the responsibilities of unions have grown.

In the interest of "fair representation," however, the NLRB has frustrated union efforts to recoup these costs from free riders. In *Hughes Tool Co.*, 104 NLRB 318 (1953), for example, the Board held that a union could

not charge nonunion employees a flat rate for handling their grievances, or a graduated fee for handling arbitrations. In *Machinists Local 697*, 223 NLRB 832 (1976), the Board held that a union could not charge nonunion employees the actual costs of handling their grievances and arbitrations. In both cases the Board reasoned that these charges were unlawful because similar fees were not charged to union members, thereby ignoring the fact that the members had presumably already met the expense of such representation in their dues.

Whatever the wisdom of these NLRB decisions, Local 681 continued to represent the employees at the Natchez mill long after it ceased to have any dues-paying members at that location.[1] Between May 1976 and June 1978, the Union's agent travelled to Natchez once a

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[1] It is not clear whether the Union could have "walked away" from this situation while the collective bargaining agreement was still in force. The NLRB allows filing of petitions for decertification only between the 90th and 60th day prior to the expiration of the contract or after the termination of the contract. *See Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000 (1958). Such petitions must be filed by employees or a "labor organization acting in their behalf," 29 C.F.R. § 102.60 (1977), and this has been interpreted as a filing "by unit employees or by an organization *other than* the currently recognized or certified organization representing employees." Krupman & Rasin, *Decertification: Removing the Shroud*, 30 LAB. L.J. 231, 232 (1979) (emphasis added). Research has failed to locate a single precedent in which the certified bargaining representative itself sought decertification. *See* 29 U.S.C. § 159(c)(1)(A) (1976). Indeed, as long as even a single member of the bargaining unit remains a member of the union, the union's obligations under the contract may subject it to liability in the event of a breach. *See* 29 U.S.C. § 158(d) (1976) ("the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" without complying with such requirements as serving written notice 60 days prior to negotiating termination or modification). Even though the shop steward at the Natchez mill did not pay dues by virtue of his position, he apparently remained a member of the Union until it was decertified in July 1979.

week to handle grievance, insurance, pension, vacation, and other matters and to attend safety meetings. The Union successfully prosecuted 19 grievances, negotiated a new contract after frequent bargaining sessions resulting in wage increases and other added benefits for the Natchez employees, and hired an attorney to represent Local 681 in a Title VII civil rights action. In the fiscal year ending June 30, 1977, Local 681 expended approximately $10,700 in order to represent the employees at the Natchez mill.[2]

It is not surprising that the Union attempted to remedy this erosion of its financial resources by proposing the "representation fee" clause to the company during contract negotiations in May 1977.[3] The clause would have collected from each nonunion employee "a pro rata

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[2] Brief for Petitioner Union (Union Brief) at 9-11; *see* Initial Decision, 252 NLRB 1299, 1300-02 (1980).

[3] The Union also proposed that similar clauses apply to employees represented by the Union at three other mills owned by the Company—Camden, Arkansas (Local 706), Panama City, Florida (Local 229), and Springhill, Louisiana (Local 141). These mills did not present the same problem to the Union. The 46 and 37 employees represented by Locals 141 and 229, respectively, continued to maintain their union membership. Only two of the 29 employees represented by Local 706 refused to pay their dues. See 252 NLRB at 1300 n.3.

But for the fact that the Union represents the employees at yet another facility of the Company at Vicksburg, Mississippi, where a similar issue has been raised in collective bargaining negotiations, we would face a serious problem of mootness in this case. Since the contractual negotiations that precipitated this litigation, the Company has sold its mill at Panama City, Florida, and has closed the mill at Springhill, Louisiana. The Union and its locals have been decertified at the two mills in Camden, Arkansas, and Natchez, Mississippi. The Union and the Company have preserved the demand for a "representation fee" in the Vicksburg negotiations pending the outcome of this case, however, and both the NLRB and the Union agree that this case is not moot. Brief for Respondent NLRB (NLRB Brief) at 7 n.5; Union Brief at 13.

share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement," as determined by "an independent audit to determine those services performed by the union directly related to the collective bargaining process." The initial representation fee required of the 38 employees at the Natchez mill would have been $5 a week, allowing the Union to collect approximately $9,900 a year or somewhat less than the $10,700 expended by Local 681 in representing those employees. The clause specifically stated that in no event would the representation fee exceed the dues and assessments required of Union members. Had the Natchez employees remained in the Union and paid all their dues and assessments under the pre-existing dues structure, the Union would have collected a total of $14,200—which would have provided approximately $3,500 in additional income that it could have used for institutional expenses.[4]

## II. The Legal Issue

There is no doubt that the proposed representation fee violates the Mississippi right-to-work laws,[5] which state:

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[4] This figure is based on a dues structure for Local 681 of $8.25 per month plus the two percent working dues. See 252 NLRB at 1300. Other locals had widely varying dues structures, and it should be noted that the representation fees sought by Locals 141 and 706 would have been equal to the amount of dues paid by their members, and thus unlawful. *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963). The administrative law judge noted this problem, but explained that "the complaint places at issue only the validity of the last of Respondent's proposals [concerning Local 681 in Natchez], and does not rely on the bargaining history; and I limit this Decision to that issue." Initial Decision, 252 NLRB at 1304 n.12.

[5] The same conclusion holds for the right-to-work laws of the other three states involved in the negotiations. *See* 252 NLRB at 1302 n.6 (right-to-work laws of Arkansas, Louisiana, and Florida).

> No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

Miss. Const. Art. VII; Miss. Code Ann. § 71-1-47. This observation precipitates but does not resolve the court's inquiry, of course. State law generally cannot be applied to limit the arrangements that unions and employers may make concerning subjects of collective bargaining made mandatory by the National Labor Relations Act, and the administrative law judge specifically found that the representation fee proposed by the Union was such a mandatory subject of bargaining under section 8(a)(3) and 8(d) of the Act, 29 U.S.C. §§ 158(a)(3), (d). Initial Decision, 252 NLRB 1299, 1303 (1980).

In section 14(b) of the Act, however, Congress authorized the states to enact statutes in conflict with this federal law. Section 14(b) provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b). In other words, when state laws that fall within the scope of section 14(b) conflict with provisions of federal law, state law governs. But the extent to which section 14(b) authorizes states to limit collective bargaining, an area in which Congress has otherwise preempted the field, is clearly a federal question. *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1976); *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 770-71 (9th Cir. 1965). We must therefore determine whether the Mississippi laws banning payment of "charges of any kind" constitute a prohibition of "membership" that is within the scope of section 14(b).

The Supreme Court has carefully left open the precise definition of what it means to require "membership" in a labor organization, as that term is used in section 14(b). In companion cases decided in 1963, the Court did hold that the term "membership" could be "whittled down to its financial core." At issue was the legality of the "agency shop" arrangement, which leaves union membership optional but requires nonunion employees to pay to the union sums equal to the initiation fees and dues of union members. In *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), the Court observed:

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

*Id.* at 742. As a result, the Court said, the "agency shop" is the practical equivalent of the "union shop," an arrangement under which all employees must join the union within a specified period of time as a condition of continued employment. Unions were therefore permitted to bargain for an agency shop in any state in which they could bargain for a union shop, *NLRB v. General Motors Corp.*, but could not bargain for an agency shop in any state where the right-to-work laws prohibited bargaining for a union shop. *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963).

*Schermerhorn*, however, clearly left open the status of the kind of representation fee at issue in this case. Originally, the petitioners in *Schermerhorn* had likened their proposal to the agency shop involved in *General Motors*. Upon briefing and argument, however, the petitioners made a last-minute effort to distinguish their contract from an agency shop. 373 U.S. at 752 n.4. The clause provided that nonunion employees would contribute to the union "for the purpose of aiding the Union in

defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit." The petitioners claimed that this confined nonunion payments "to collective bargaining purposes alone," and prohibited the union from using the payments "for institutional purposes unrelated to its exclusive agency functions." *Id.* at 752.

The Supreme Court was "wholly unpersuaded" by this "belated" attempt to distinguish *General Motors*. Justice White's opinion gave two primary reasons. First, contrary to the petitioners' suggestion, the clause at issue imposed "no ironclad restrictions" on what the union could do with the payments it received from nonmembers, and therefore could have allowed the union to use these payments for "institutional items." *Id.* at 753.[6] Second, because that proposed "service fee" was set *equal* to the union's initiation fees and dues, and because the union dues could be expended for a variety of purposes, there was no guarantee that a nonmember might not pay *more* of the union's collective bargaining costs "than his pro rata share." *Id.* at 754. The Court explained:

> If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmem-

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[6] The Court elaborated on these "institutional items" by quoting from the union's brief:

> Rather typically, unions use their members' dues to promote legislation which they regard as desirable and to defeat legislation which they regard as undesirable, to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest and on their behalf.

373 U.S. at 753 n.6.

> ber will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities.

*Id.* Accordingly, there was no reason why the clause should, "in the present posture of the case, be construed against respondent to raise a substantial difference between this and the *General Motors* case." *Id.* at 752. It would be anomalous, the Court said, to let Florida ban agency shop agreements under which union members and nonmembers paid equal shares while forbidding Florida to ban an arrangement in which nonmembers might pay even more bargaining costs than members. *Id.* at 754.

By discussing the *Schermerhorn* petitioners' position, clearly only a product of appellate strategy, in so much detail, the Court signalled that it considered the status of the kind of representation-fee proposal now before us to be a difficult question. The Court's discussion draws a clear distinction between agency shops and the collection of fees to cover representation costs. *Schermerhorn* does not govern this case, because the belated effort to distinguish *General Motors* failed. If the representation fee proposed by the Union in this case meets the two conditions laid down in *Schermerhorn*—"an ironclad restriction" against using nonmember payments for purposes, other than servicing the collective bargaining agreement, with nonunion members paying no more than their pro rata share of such expenses—then the clause conceivably does not require "membership in a labor organization" and therefore is beyond the reach of state right-to-work laws whose application depends on section 14(b).

The NLRB, which affirmed the decision of the administrative law judge in a simple one-page decision and order, 252 NLRB 1299 (1980), seems not to have devoted

the careful attention to this case that *Schermerhorn* requires. Nothing in subsequent Supreme Court decisions has departed from its dicta in *Schermerhorn*.[7] The question before us is open, and is a matter of some significance. Our answer must center on the congressional intent in enacting section 14(b). The legislative history is lengthy, often dry, and relatively inconclusive, but it casts serious doubts on the reasoning of the majority.

## III. The Legislative History of Section 14(b)

A fundamental tension in labor law, as indeed in constitutional law, exists between encouraging majority rule and protecting the rights of the minority. Congress faced this problem many times when it enacted the historic Wagner Act and amended it with the Taft-Hartley Act, and the genesis and scope of section 14(b) must be understood in light of this tension.

The Wagner Act, passed in 1935 during an explosive period in our social history, gave workers the right to organize unions and to bargain collectively with their employers.[8] The legislation was a factor in the doubling

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[7] In *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407 (1976), the Court held that the Texas right-to-work law could not be enforced "with regard to an employment relationship whose principal job situs" was not in Texas, even though the employees were hired in Texas and had "a number of other contacts" with the state. *Id.* at 418, 410. In dicta, the Court explained that "Section 14(b) simply mirrors that part of § 8(a)(3) which focuses on post-hiring conditions of employment." *Id.* at 417. *Compare id. with Retail Clerks v. Schermerhorn*, 373 U.S. at 751: "The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent."

[8] Prior to passage of the Act, courts had resisted permitting unions to bring suit to enforce collective bargaining agreements because unions were unincorporated associations. *See, e.g., A.R. Barnes & Co. v. Berry*, 169 F. 225, 228 (6th Cir. 1909); *see generally* Sturges, *Unincorporated Associations as Parties to Actions*, 33 Yale L.J. 383, 396-99 (1924).

of union membership between 1933 and 1937, a period coinciding with the rise of the great industrial unions. It was also followed by dramatic and often violent strikes. World War II brought a momentary hiatus in industrial strife, but at its conclusion "the no-strike era came to an end, and in 1947 the country experienced the largest strike wave in its history." Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1523 (1981). Anti-union sentiment was widespread, and representatives on both sides of the aisle agreed that legislative reforms were required.

Congress could conceivably have pulled back from the labor issue entirely and returned the question to the hands of the states. Instead, the Taft-Hartley Act of 1947 concentrated on amending the structure of the NLRB and revising methods for resolving representation disputes. Section 14(b) was not the most substantive change amidst these reforms. It did not enact a new policy, but simply made explicit a congressional understanding that had accompanied passage of the earlier Wagner Act concerning the general tension between rule by union majority and the rights of nonunion minorities.

A full discussion of section 14(b) must therefore begin with the broader problem, and the evolution in congressional attitudes toward the rights of the nonunion minority in a given bargaining unit. At the outset, it may help to define some of the terms that frequently arose in this context. An open shop allows the employer to hire without regard to union membership, and lets employees obtain or refuse membership in the union as they please. A closed shop requires the employer to hire union members only. A union shop allows the employer to hire without regard to union membership, but requires employees to become members of the union within a specified time after they have been hired. Preferential hiring requires the employer to give a preference to union members, although nonunion employees may be hired if union members are unavailable. Finally, maintenance-of-

membership agreements let employees obtain or refuse membership in the union as they please, but require that employees who become union members maintain their membership for the duration of the agreement. The closed shop and the union shop played particularly important roles in shaping the congressional views about minority rights under a model of trade union democracy.

A. *The Closed Shop*

The Wagner Act, with its emphasis on collective bargaining, treated minority rights almost as an afterthought. Section 9(a) provided:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer.

Ch. 372, § 9(a), 49 Stat. 453 (1935) (codified at 29 U.S.C. § 159(a)). Section 8(3) outlawed attempts by employers to force workers into company unions or discourage them from forming their own, but distinguished these practices from union bargaining with employers over means to control the problem of free riders:

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, *Provided*, That nothing in this act . . . shall preclude an employer from making an agreement with a [qualifying] labor organization . . . to require as a condition of employment membership therein . . . .

Ch. 372, § 8(3), 49 Stat. 452 (1935) (codified at 29 U.S.C. § 158(a)).

Several Senators criticized the Act for ignoring the rights of employee minorities. *See, e.g.*, 79 CONG. REC. 7671 (1935) (Senator Tydings) ("As I see this particular section [§ 9(a)], it looks to me like an effort to force every man in America to join a certain kind of union, whether or not he wishes to join that union"); *id.* (Senator Hastings) ("Is it not true that the individual worker should be free to decline association with his fellows? Can that be true under this bill?"). Senator Wagner responded:

> The Senator is concerned with what happens to the minority. Under this proposed legislation . . . there will be no advantage which a majority can have under an agreement to which the minority is not also entitled, and in order to have that advantage the minority need not join any organization. It can join or not join, either way. It cannot be discriminated against under any other provision of the law.

*Id.* at 7673. But Senator Hastings was unconvinced. He turned from section 9(a) to section 8(3), and reiterated the charge that the bill would require all workers to join a union regardless of their wishes. Senator Wagner again responded:

> No, Mr. President; the Senator apparently does not understand that provision. It does no more than to legalize a closed-shop agreement, which is a matter of agreement between employer and employee where it is now sustained by the public opinion of the State. . . . The provision will not change the status quo. That is the law today; and wherever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation. Closed-shop agreements are made all over the country, and they are

> matters of agreement. The question of compulsion is not involved in them.

*Id.* at 7673-74.

But Senator Wagner turned out to be wrong. Closed-shop agreements, which prohibited hiring any employee who was not already a union member, did involve compulsion. Between 1935 and 1947, the closed shop became notorious. Union leaders, with unreviewable authority to admit new union members and expel old ones, acted in a corrupt and undemocratic fashion to perpetuate their power. Articles in the popular press and legal journals condemned closed shops and the control they gave unions over the careers of workers. *See, e.g.* Newman, *The Closed Union and the Right to Work*, 43 COLUM. L. REV. 42 (1943) (arguing that unions operating under closed shops used restrictive admissions requirements to create labor monopoly, perpetuate union management, and protect social prejudices). The Senate Report accompanying the Taft-Hartley Act found:

> Until the beginning of the war only a relatively small minority of employees (less than 20 percent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 percent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements.

It continued with specific examples:

> In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. . . . Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea.

> Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract.
>
> Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee.

S. REP. No. 105, 80th Cong., 1st Sess. 6-7 (1947), I Legislative History of the Labor Management Relations Act 412-13 (1948) (hereinafter Leg. Hist.)

Animosity toward the closed shop was widespread in Congress. *See, e.g.*, 93 CONG. REC. 3453 (1947) (remarks of Representative Holifield); *id.* at A1223 (extension of remarks by Representative Landis). Representative Jonkman observed that "the principle criticism of unions today is not directed at unionism itself but to the irresponsible and corrupt management and leadership into which many unions have drifted. It requires but little reading of the hearings on this bill to cause one to shudder at the tyranny and depredation committed by such union officers and leaders." *Id.* at 3560. Accordingly, Congress added section 8(a)(3) in the Taft-Hartley Act banning the closed shop. Ch. 120, tit. 1, § 8(a)(3), 61 Stat. 140 (1947) (codified at 29 U.S.C. § 158(a)(3)). That section continued:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organiza-

> tion (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

*Id.*, 61 Stat. at 141.

B. *Union Shops and Union Security*

It is absolutely crucial to distinguish congressional revulsion toward the closed shop from the congressional treatment of other union security agreements. Congress abolished the closed shop, but it retained lesser forms of union security as subjects of mandatory bargaining under federal law. The closed shop and section 14(b) were thus viewed in different contexts because they focused on different forms of union security agreements.

The majority opinion obfuscates this distinction. The Senate Report that it quotes on page seven, which is said to demonstrate that Congress enacted section 14(b) in order to let the states make their own judgments on the issue of free riders, is not a discussion of section 14(b) at all. The Senate Report only addressed the decision to ban the closed shop, as demonstrated by the paragraphs immediately following the paragraph quoted by the majority:

> The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop

> which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be tolerated. . . . This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. . . . If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power.

S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), Leg. Hist. at 412-13. The Senate Report could not possibly have discussed section 14(b) in any event, because that section originated in the House, was not part of the Senate bill, and was adopted by the Senate only after conference.

It is true that several members of Congress saw no real difference between the closed shop and the union shop, and urged that both be abolished. Representative Fisher declared that "[t]he union shop and the closed shop are Siamese twins. In either case a man cannot work unless he belongs to the union, whether he wants to belong or not." 93 CONG. REC. 3555 (1947). He observed that "the right to work is one of the most sacred rights a man has," and called the union shop "a form of involuntary servitude." *Id.* Representative Hoffman also urged that

> a man should have the right to join or not to join, to be bound by or not to be bound by, union rules. If this Congress wants to forsake the American principle that the man who must live by toil, who must work if he would eat, have clothing, a home, and be able to provide for his family—if this Congress wants to turn its back upon that principle and say that no man shall work when the employer and the

> bare majority of the employees say he cannot work unless he conforms to their rules and restrictions—it has the power to do so.

*Id.* at 3554. Representative Abernathy condemned a system that would have workers "paying tribute to someone else" in order to work. *Id.* at 3555. Representative Jonkman said:

> I have, I dare say, thousands of labor constituents in my district who cannot conscientiously become members of certain unions because they cannot and dare not accept joint responsibility for the conduct of leaders of such type. They should not be compelled by the union-shop provision in this bill to accept that stigma but have the right to refrain from joining any union whose leaders engage in disreputable practices.
>
> It is, of course, true that all legislation is the result of compromise. But to compromise on this principle is as I said at the outset a further frittering away of a fundamental American freedom.

*Id.* at 3560.

These criticisms were unavailing, of course. Congress added provisions making it more difficult for workers to obtain a union shop,[9] but it retained the union shop as a mandatory subject of bargaining in section 8(a). Several members emphasized that this policy was required by simple equity. *See, e.g.*, 93 CONG. REC. 3546-47 (remarks of Representative Celler); *id.* at 3558 (remarks of Representative Robsion). It is significant, however, that when Representative Hoffman offered an amendment designed to make it clear that a worker could not be "denied employment unless he joins," he was persuaded to withdraw that amendment after Representative Barden called his attention to section 14(b). *Id.* at 3561-62.

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[9] *See* text at note 10 & n.10 *infra*.

C. *Section 14(b)*

Section 14(b) was not a controversial aspect of the Taft-Hartley Act because Congress considered it merely to restate the law under the Wagner Act. The Senate Report to the 1935 Wagner Act had explained that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. REP. No. 573, 74th Cong., 1st Sess. 11 (1935); *see* H.R. REP. No. 1147, 74th Cong., 1st Sess. 19-20 (1935). By enacting section 14(b) in 1947, Congress reiterated the point that it had not been the intention of the earlier Congress "to override State laws regulating the closed shop." S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947), Leg. Hist. at 412; *see* H.R. REP. No. 245, 80th Cong., 1st Sess. 44 (1947), Leg. Hist. at 335.

> It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect.

H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 60 (1947), Leg. Hist. at 564.

It may be inferred, of course, that the decision to spell out the existing law in the Taft-Hartley Act was prompted by the same reaction against union abuses that had led Congress to ban the closed shop. The legality of the union shop had been preserved over the vehement

objections of many opponents, but only after Congress took steps to correct the abuses of the union shop as well. The House Report was careful to explain these limitations in detail:

> The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed. Such agreements are lawful, however, only if the employees by secret ballot have selected the union as their bargaining agent, and if the majority of all the employees, by a separate secret ballot, authorize the union to enter into the agreement, *and if agreement is not prohibited by State law.* An employee may be expelled from the union and thus forced to leave his job only if the expulsion is by reason of his failing to pay fees and dues imposed upon employees generally. Under this clause, employers may select their own employees. Employees have 30 days to decide whether or not to join the union. Unions may not cause the discharge of employees by discriminating against them. The agreement must be voluntary. Unions may not strike to compel employers to enter into such agreements. They are subject to loss of bargaining rights if they do.

H.R. REP. No. 245, 80th Cong., 1st Sess. 9 (1947), Leg. Hist. at 300 (emphasis added). Clearly, the predominant if not the only purpose of section 14(b) was to provide yet one more check on the abuses that could exist under "compulsory unionism." [10]

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[10] Critics of the Taft-Hartley Act focused less on section 14(b) than on the other provisions intended to make it more difficult for unions to obtain a union shop. *See, e.g.*, 93 CONG. REC. 3554 (1947) (remarks of Representative Kennedy) (objecting to provision forbidding strikes for the purpose of obtaining union shop); *id.* at 3454 (remarks of Representative Holifield) (objecting to require-

The crucial point to be drawn from the legislative history of section 14(b), however, is that Congress never specifically defined what it meant by "compulsory unionism." The paragraph from the House Report quoted above is the entire passage of a section headed "compulsory unionism." The Conference Report stated that section 14(b) would prevent "any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal." H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947), Leg. Hist. at 564. But this too leaves the content of the term undefined.

The best evidence of the congressional intent may therefore lie in the kinds of "compulsory unionism" that members of Congress understood had been banned by the state right-to-work laws. Representative Holifield, a defender of closed shops as well as union shops and maintenance-of-membership agreements, noted that

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ment that union shop clauses be approved by majority vote of the entire bargaining unit, rather than a majority of those voting on the question); *id.* at 6532 (remarks of Senator Barkley) (objecting to same provision). The statement of Minority Views attached to the House Report said little about section 14(b), but bitterly condemned a provision in the Act that union shop employees could not be denied employment if they offered to pay the required dues and initiation fees:

> This, in effect, means that the union is shorn of its power to discipline its own members for good cause. A spy, a stool pigeon, an antiunionist, any individual whose sole purpose is to destroy the union or bring it into disrepute by slander, defamation, or undisciplined action, can continue his activities with impunity. . . . [The provision] deprives the union's disciplinary action of any element of sanction or of deterrent effect.

H.R. REP. NO. 245, MINORITY REPORT, 80th Cong., 1st Sess. 80-81 (1947), Leg. Hist. at 371-72.

> of the 77 percent of all employees in unions [that worked] under some form of union security, 30 percent were under closed-shop contracts, 15 percent under union-shop contracts, 29 percent under maintenance-of-membership contracts, and 3 percent under preferential-hiring contracts—another form of union security provision.

93 CONG. REC. 3453. He observed:

> Under existing law all of these types of shops are legal excepting in some few States in which hysterical legislatures, reckless of constitutional consequences, have banned the closed shop.

*Id.* Representative Barden contended that

> in view of the fact that many of the States have passed laws dealing with the closed shop, why, then, the committee felt, and I am sure the whole House will feel, that the States should be recognized and their laws should certainly be given full power and effect as far as a State is concerned.

*Id.* at 3562. Representative Case of South Dakota urged adoption of section 14(b) because

> it strengthens the provisions of the bill so far as bans on the closed shop are concerned in the States which have taken action. I think now that there are about 12 States that have taken formal action and another dozen that have that kind of action under consideration.

*Id.* at 3559. Similarly, in the Senate, the emphasis was on state laws prohibiting the closed shop. Senator Taft defended the section 8(3) proviso, noting that it "did not in any way prohibit the enforcement of State laws which already prohibited closed shops." *Id.* at 6520. His summary of the bill explained that section 14(b) would allow states to prevent "compulsory union membership agreements" where such agreements violated state laws

against "compulsory unionism." *Id.* at 6445. Senator Barkley denounced the bill because union shops would be prohibited "in any State where a legislature has passed what we call a nonunion or closed-shop bill," *id.* at 6532, and Senator Morse objected to the "antilabor bias" of the bill:

> Thus, we lay down in the bill a very full and complete national policy as to closed- and union-shop agreements. At the same time, the bill provides in section [14(b)], however, that the national policy may be entirely disregarded and superseded by the States if they desire to impose a more restrictive policy *on the same subject matter.*

*Id.* at 6456 (emphasis added). At no time, in the committee reports or during the debates, was it intimated that "compulsory unionism" meant anything more than the closed shop, union shop, and conceivably contracts requiring maintenance of membership or preferential hiring of union members.[11]

One final observation, if an obvious one, should be made about the legislative history of section 14(b). The debates make it clear that Congress knew that several states had banned the closed and union shop, but the legislative history does not suggest that Congress knew these laws sometimes prohibited payment of "any dues, fees or charges of any kind to any labor union" as well. Congress emphatically did not intend to give the states a free hand in amending federal labor law. Representa-

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[11] To the extent that other contemporaneous sources are helpful, it is worth examining the NLRB's LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (1948), published one year after passage of the Taft-Hartley Act and used by the Supreme Court as an authoritative guide. *See, e.g., Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. at 416; *NLRB v. General Motors*, 373 U.S. at 741. The "sectional index" to this history simply expresses the topic of section 14(b) as "State *Union-Shop* Laws." Leg. Hist. at xxiv (emphasis added).

tive Kearney suggested, and Representative Hoffman moved, that section 14(b) be amended by inserting a period and striking out the rest of the section, to read:

> Nothing in this act shall be construed to invalidate any State law or constitutional provision.

93 CONG. REC. 3559, 3562. The objections to this amendment were obvious. As Representative Case of South Dakota stated:

> Of course, if you put a period there, it would be pretty broad because it would deal with subjects other than the right of the employer to make closed-shop agreements. You might nullify much of the bill, because you would establish State rights to deal with all phases of industrial relations in spite of any provisions whatsoever in the act.

*Id.* at 3559. The amendment was withdrawn.

Had Congress chosen, it could have framed section 14(b) in terms identical to existing state right-to-work laws. Employers could have been precluded from making agreements "requiring membership in or payments of any kind to a labor organization," rather than those simply "requiring membership in a labor organization." On its face, section 14(b) is by no means as broad as the more restrictive state laws that the majority opinion now suggests it incorporated. Congressional attention focused on closed shops and union shops, which were said to place workers at the mercy of capricious or corrupt treatment by labor organizations. Section 14(b) was meant to extend associational freedom to employees in states that had passed legislation dealing with this subject. But the Taft-Hartley Act did not adopt the philosophy that labor unions should be destroyed. Nothing in the legislative history of section 14(b) suggests that Congress meant to give this power to the states.

## IV. Section 14(b) Does Not Permit States to Ban Valid Representation Fees

It cannot be shown that the legislative history of the Taft-Hartley Act and section 14(b) supports the NLRB's ruling in this case. *See* majority opinion at 7. The legislative history demonstrates only that Congress recognized the tension between union majorities and the rights of nonunion minorities, and that in the interest of associational freedom it allowed the states to ban contracts making employment contingent on the "stigma" of joining an organization with which the worker could not "conscientiously" agree. *See* 93 Cong. Rec. 3560 (1947) (remarks of Representative Jonkman). Debate was framed in terms of "compulsory unionism," "paying tribute," and "involuntary servitude," thus taking on ideological proportions. But section 14(b) fully met congressional concerns by referring to compulsory "membership."

### A. *The Meaning of "Membership"*

The wheel has come full circle, and the question still remains the meaning of this term. Plain meaning has its limitations, but it must count for something. "To ascertain what Congress meant . . . we would do well to begin [with] what Congress said." *Shapiro v. United States*, 335 U.S. 1, 39 (1948) (Frankfurter, J., dissenting). There is no suggestion whatsoever in the legislative history that a worker who pays a fees for services rendered by the union thereby becomes a "member" of the union. In any other context, such a proposition would be facially absurd. A commuter can be required to pay a toll for crossing a bridge owned by a corporation without therein becoming a "member" of that corporation. An action for *quantum meruit* by a contractor does not make the defendant a "member" of the contracting firm.

The majority's interpretation is particularly egregious because it ignores the emphasis on "compulsory unionism" that surfaced again and again in Congress. Non-

union employees working under a representation-fee contract would not in any way be required to support the union, or fund its institutional, union-oriented activities. They would not sign membership cards or be carried on the union's rolls. *See NLRB v. Delaware-New Jersey Ferry Co.*, 128 F.2d 130, 134 (3d Cir. 1942). They would not be required to embrace participation in union activities and maintain "good standing." *See Plumbers' Union v. Borden*, 373 U.S. 690, 695 (1963); *Radio Officers v. NLRB*, 347 U.S. 17, 39-42 (1954). They would not fill out applications, take oaths, or attend meetings. *See Union Starch and Refining Co. v. NLRB*, 186 F.2d 1008, 1011 (7th Cir. 1951). They would not be subject to union-imposed disciplinary measures enforceable in state courts. *See United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980, 981 (9th Cir. 1979); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1085 (9th Cir. 1975). They would not have "fulfilled the requirements for membership in such organization." 29 U.S.C. § 402 (o) (Supp. III 1979) (Landrum-Griffin Act definition of union "member"); *see In re Carter*, 618 F.2d 1093, 1103 (5th Cir. 1980). By no stretch of the imagination could employees paying a representation fee be considered members of the union, "full-fledged" or otherwise. They would have none of the responsibilities of union membership, none of its "stigma," and none of its perquisites.

The NLRB has itself concluded that requiring non-union employees to pay periodic amounts "for the support of the bargaining unit" does not make those employees "members" in the union. In *Public Service Company of Colorado*, 89 NLRB 418 (1950), the contract provision at issue stated:

> Union membership . . . shall not be required as a condition of employment, but all employees in the classifications covered by this Agreement shall, as a condition of employment, within sixty (60) days after hiring, or commencing August 1, 1947, pay to the

> Union Two ($2.00) Dollars per month for the support of the bargaining unit.

The initial decision had concluded that because the "support money provision does not require, and is not related to a requirement of 'membership,' " it did not come within the terms of section 8(3) and could not be lawfully enforced. *Id.* at 420. After searching through the legislative history of the Wagner Act, the Board ruled to the contrary [12] *even though it agreed* that the provision required "as an employment condition something other than actual 'membership.' " *Id.* *See id.* at 430 (opinion of General Counsel that requiring nonmembers to pay union money "for the support of the bargaining unit" is "clearly distinguishable from a requirement of 'membership in a labor organization' ").

> The argument that the "support money" requirement in the contract is necessarily contingent upon the Union's acceptance of an employee membership application finds no support in either the contract or in the statute. The Wagner Act was not concerned with an employee's right to membership in a labor union and held no guarantee of membership, even where, in a union security contract, membership *is* made a condition of employment.

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[12] The Board reasoned that union security clauses that fell short of requiring "membership" were nevertheless entitled to protection under section 8(3) of the Wagner Act. *See NLRB v. General Motors*, 373 U.S. at 741 ("We find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8 (a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security agreements permissible under state law"); *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301, 307 (1949) ("The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement"). It should be emphasized, however, that only union security agreements *requiring membership* derive their legitimacy from section 8(a)(3). *See* pp. 36-37 *infra*.

*Id.* at 425. The Board reaffirmed this ruling under the 1947 Taft-Hartley amendments to the Wagner Act in *American Seating Co.*, 98 NLRB 800 (1952). It now departs from that reasoning with no legal basis for doing so.

*NLRB v. General Motors Corp.*, 373 U.S. 734, is not to the contrary, and indeed cuts against the position adopted by the majority. The "financial core" of membership was defined as the "payment of fees and dues." *Id.* at 742. As a matter of the Supreme Court's definition, then, payment of service fees in an amount less than initiation fees and dues *cannot* constitute membership. "At its core, compulsory unionism refers to mandatory payment by employees of union dues and initiation fees." *International Union, United Automobile, Aerospace and Agricultural Implement Workers v. National Right to Work Legal Defense and Educ. Foundation, Inc.*, 590 F.2d 1139, 1143 (D.C. Cir. 1978). "[S]uch 'membership' includes *only* the duty to pay dues and initiation fees." *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d at 982 (emphasis added). *Accord, NLRB v. Hershey Foods Corp.*, 513 F.2d at 1087; *Boilermakers Local 749 v. NLRB*, 466 F.2d 343, 344-45 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).[13] The interpretation of "membership" adopted by the majority ignores these explicit holdings. *See Associated General Contractors v. Otter Tail Power Co.*, 457 F.Supp. 1207, 1217 (D.N.D. 1978).

The majority therefore extends the scope of section 14(b) to an unprecedented degree. "Section 14(b) does

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[13] These cases are part of the long line following *Union Starch and Refining Co. v. NLRB*, 186 F.2d 1008 (7th Cir. 1951), holding that the condition of "membership" for section 8(a)(3) purposes is satisfied even when an employee in a union shop refuses to respect union-imposed obligations other than the duty to pay dues and initiation fees. The Supreme Court specifically relied on the *Union Starch* rule in *NLRB v. General Motors*, 373 U.S. at 743 n.10.

not empower states to ban all involuntary relationships between workers and unions." *Laborer's International Union, Local 107 v. Kunco, Inc.*, 472 F.2d 456, 458 (8th Cir. 1973). It is now settled law, for example, that nondiscriminatory union-operated hiring halls may not be prohibited by state right-to-work laws under section 14(b). *See, e.g., NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965); *cf. Local 357, International Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961) (exclusive hiring hall does not violate closed shop prohibition of section 8(a)(3)). Unions are further permitted to charge nonmembers a special service or referral fee for the use of the hiring hall, if the fee is reasonably related to the expenses of operating the halls. *NLRB v. Local 138, International Union of Operating Engineers*, 385 F.2d 874, 876-77 (2d Cir.), *cert. denied*, 391 U.S. 904 (1968); *Local 825, International Union of Operating Engineers, AFL-CIO*, 137 NLRB 1043, 1044 (1962) (nonmember must pay his "pro rata share of the cost and expense of operating the employment list and referrals therefrom" even though union members pay no fee for referrals).[14]

The majority contends that these cases are "clearly distinguishable" because use of a hiring hall "precedes

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[14] The hiring hall cases again emphasize that the scope of section 14(b) does not depend on state interpretations of state right-to-work laws. In *Laborers' Int'l Union v. Kunco*, 472 F.2d 456, the court set aside the judgment of the Arkansas Supreme Court, which had held that even nondiscriminatory hiring halls violated that state's right-to-work laws in *Kaiser v. Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W.2d 449 (1962). *Compare Florida Education Ass'n v. Public Employees Relations Comm.*, 346 So.2d 551 (Fla. App. 1977) (right-to-work law held to prohibit contract requiring all employees to pay pro rata share of bargaining and grievance costs) *with Meade Electric Co. v. Hagberg*, 159 N.E.2d 408, 414 (Ind. App. 1959) (right-to-work law held not to ban agency shops because of "the plain, unequivocal language" of the law: "To depart from the meaning expressed by the words of the statute is to alter it, and it is not construction but legislation . . . .").

hiring," and because state regulation of union membership under section 14(b) "applies only to post-hiring" arrangements. Majority opinion at 10. Both assertions are dubious. The legislative history of section 14(b) shows that Congress was *most* concerned about the evils of the closed shop, which by definition requires that union membership "precede hiring," and that Congress endorsed state right-to-work laws banning closed shops. Hiring halls were specifically discussed in the legislative history. *See* S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947), Leg. Hist. at 412 ("In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment.") More important, only a strained conception of hiring halls would suggest that they have no post-hiring consequences. In *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966), the court explained that the purpose of such a hall would be to "establish a system of seniority rights and job priority" in the otherwise "transitory" construction trade. Such an arrangement undoubtedly affects the post-hiring relationship between employer and employee. The court added:

> This is a multi-employer situation where the essence of employee security would rest on job priority standards being established through a common source—the hiring hall. . . .
>
> No doubt union membership will be encouraged under the arrangement, indeed it may be a boon to the union; nevertheless such an arrangement does not constitute compulsory unionism so long as the arrangement is not employed in a discriminatory manner.

*Id.* at 452, 453. The Supreme Court has also suggested that "the very existence of the hiring hall encourages union membership. We may assume that it does." *In-*

*ternational Bhd. of Teamsters v. NLRB*, 365 U.S. at 675. *See Mountain Pacific Chapter*, 119 NLRB 883, 896 (1957) (early decision holding even nondiscriminatory hiring hall illegal per se because "the inference of encouragement of union membership is inescapable."). Despite their clear post-hiring consequences, union hiring halls cannot be prohibited by states under section 14(b) because such halls do not meet the test of "compulsory unionism." [15]

The final blow to the majority's suggestion that section 14(b) governs this case because a "post-hiring" arrangement is involved comes from *SeaPak v. Industrial, Technical and Professional Employees*, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1970), *aff'd mem.*, 400 U.S. 985 (1971). The Georgia right-to-work statute provided that authorizations for deduction of union dues were revocable at the will of the

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[15] In *Machinists Local 697*, 223 NLRB 832 (1976), the Board reasoned that hiring hall precedents were not relevant to the question whether unions could charge nonmembers the actual cost of handling their grievances on the ground that unions have no obligation to operate hiring halls but do have an obligation to represent all members of the bargaining unit fairly. *Id.* at 834. As the NLRB's chairman observed in dissent, this reasoning is extremely weak. "Contrary to the majority herein, a nonmember applicant at an exclusive hiring hall is entitled as a matter of right to the services of a union without discrimination based on nonunion status. . . . I know of no rule, by statute or decision, prior to the instant case, and my colleagues cite none, that a union is obligated to furnish to all employees in a unit every service without charge." *Id.* at 836; *see NLRB v. Lummus Co.*, 210 F.2d 377, 381 (5th Cir. 1954). In *Local 825, Int'l Union of Operating Engineers*, 137 NLRB 1043 (1962), the Board found operation of an exclusive hiring hall nondiscriminatory even though nonunion employees paid *higher* monthly fees as their "pro rata share of the cost and expense of operating the employment list" than union members paid in monthly dues. "The fact that the fee paid by a nonmember is roughly equivalent to the monthy dues of a member is not, in our opinion, sufficient in and of itself to establish that the former has been required to pay more than his fair share for the use and operation of the hiring hall." *Id.* at 1044.

employee, but the federal labor statute made such authorizations irrevocable for not more than one year. The court explained:

> Counsel vigorously maintain that employees who execute authorizations revocable only after one year but who within twelve months revoke same become forced members of the union. The employee's choice is either that of continued, compulsory "membership" in the union or of termination of employment. So they argue, and the argument has some force. . . .
>
> I am inevitably confronted by the question of whether there is a Federal preemption of check-off authorizations and whether § 14(b) in prohibiting agreements requiring union membership as a condition of employment permits a state to enact check-off provisions contrary to what is provided for in § 302 of the Federal Labor-Management Relations Act.

300 F.Supp. at 1199-1200. The court's answer was emphatic.

> I think the state regulation must yield. . . . I am confident Congress did not conceive that checkoff of dues for a limited time after an employee's revocation of authorization therefor would amount to compulsory union membership as interdicted by state "Right-to-Work" laws. . . . After all, state prohibition of compulsory unionism is a Congressional dispensation of grace, not the imperious right of a state. I do not agree that the one year irrevocability provision in the Act can be varied by a state legislature under the reservation to the states of the power to prohibit "agreements requiring membership in a labor organization as a condition of employment." Section 14(b) says that and no more and it reaches no further. . . . Checkoff authorizations irrevocable for one year after date do not amount to compulsory unionism as to employees who wish to withdraw from membership prior to that time.

*Id.* at 1200-01. It is obvious that a compulsory check-off provision is a post-hiring arrangement. It is also obvious that the critical inquiry in assessing the reach of state right-to-work laws under section 14(b) is not whether they ban "post-hiring" arrangements, but whether the arrangements are a form of "compulsory unionism."

B. *Differences Between Membership Dues and Representation Fees.*

I suggest that the majority errs in thinking that section 14(b) *or* section 8(a)(3) apply in this case. The majority relies on an argument that any freshman student of philosophy would recognize as invalid: union members pay dues; the clause in issue would require workers to pay a fee; therefore the clause requires workers to become union members. Surely this overgeneralized statement overemphasizes "compulsory" and ignores "unionism." Unions may negotiate all manner of contracts that compel workers in the bargaining unit to meet particular terms and conditions of employment without transforming every such worker into a union member. Congress was not concerned about compulsion, but compulsory unionism. Paying fees to cover representation costs does not constitute "membership in a labor organization" because it falls short of what the Supreme Court has called the "financial core" of unionism—payment of initiation fees and dues.

The differences between membership dues and representation fees are more than a matter of dollars alone. Representation fees are payments for services rendered; membership dues support an institution. The Supreme Court has frequently noted the distinction between a union's "institutional costs" and its expenditures for collective bargaining purposes. *E.g., Schermerhorn*, 373 U.S. at 753; *Machinists v. Street*, 367 U.S. 740, 769-70 & n.19 (1961). In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court reviewed the constitu-

tionality of an agency shop arrangement under which the union spent part of its receipts on political activities with which certain employees disagreed. The Court upheld the arrangement, but only after it devised "a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 237.

The right-to-work laws endorsed by section 14(b) are clearly analogous to the First Amendment rights protected in *Abood*, because in neither setting may employees be required to support "ideological activity" with which they disagree. Like the schoolteachers in *Abood*, the Natchez mill employees have no obligation to subsidize the Union's institutional expenses even if they may be required to pay their fair share of collective bargaining costs.[16] But as long as these employees pay only their

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[16] To the extent that a representation fee exceeds these costs and subsidizes the union's institutional expenses, of course, it is invalid under *Schermerhorn*. The clause proposed by the Union in this case stated that the fee could not exceed the total of dues and fees assessed union members, and provided that the fee would only equal "a pro rata share" of the unit's collective bargaining costs. As the Supreme Court cautioned in *Schermerhorn*, however, these safeguards must not be "of bookeeping significance only." 373 U.S. at 753. The proposed clause could raise such problems because once a union receives a pro rata share of collective bargaining costs from nonunion employees, monies in the union treasury that had formerly been used to represent those employees will be freed up to pay other, institutional expenses of the union.

Such problems seem neither significant nor insurmountable, however. For example, the union's institutional expenditures could be frozen during the period when the representation-fee clause goes into effect, with any surplus rebated in equal shares to union and nonunion members alike. The permissible outcome would resemble that in *Abood*, where the Court suggested an exact method for separating monies collected for one purpose from monies collected for the other. Employees who objected to supporting the union's political activities were to receive "(1) the refund of a portion of

pro rata share of representation expenses, they cannot be considered members of the union because they are not supporting that institution. Section 8(a)(3) has nothing to do with the proposed representation fee, because such a fee does not require union membership as a condition of employment.

Instead, representation-fee proposals should be considered mandatory subjects of bargaining pursuant to section 8(b) of the Act, 29 U.S.C. § 158(d), which states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

The test for determining whether a particular matter comes within the scope of section 8(d) is whether it would regulate relations between employer and employee, or settle any term or condition of employment. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). The administrative law judge below specifically found that the representation fee proposed by the Union was a mandatory subject of bargaining within the meaning of section 8(d). 252 NLRB at 1303. *See NLRB v. Houston Chapter, Association of General Contractors*, 349 F.2d at 452 (contract terms "such as would provide for the establishment of a seniority system through the use of a hiring hall, no less than tenure, are terms and conditions of employment" under section

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the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion." 431 U.S. at 240; *see Railway Clerks v. Allen*, 373 U.S. 113, 120-22 (1963); *Machinists v. Street*, 367 U.S. 740, 775 (1961). The accounting treatment of particular expenditures, and the amounts permissibly collectible under the instant representation-fee clause, are questions for the Board in the first instance.

8(d)); *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d at 771 (same); *cf. NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949) ("Union security [maintenance-of-membership clause] is properly a 'condition of employment' within the meaning of § 9(a) of the National Labor Relations Act and hence, is within the statutory area of collective bargaining.").[17]

The legitimacy of a representation fee as a subject for collective bargaining also follows from the duty of fair representation that caused financial difficulty for Local 681 in the first place. As discussed above, this duty was "originally restricted to the prevention of racial discrimination." *Pyzynski v. New York Central R.R.*, 421 F.2d 854, 862 (2d Cir. 1970); *see Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 211 (1944). It has since been expanded to cover all cases in which the union draws distinctions that are "irrelevant and invidious." *Conley v. Gibson*, 355 U.S. 41, 46 (1957) (quoting *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 203 (1944)). Perhaps it may fairly be asked whether the union discrimination is truly "invidious" if it declines to prosecute grievances of nonunion employees because they pay none of the cost. But it clearly seems to constitute discrimination in reverse to suggest that whereas nonunion employees may obtain free representation, union employees must cover the costs of their grievances by paying dues. The asymmetry is itself unfair. Union efforts to combat it therefore draw an adidtional meas-

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[17] Section 9(a), 29 U.S.C. § 159(a), parallels section 8(d) in stating:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, *or other conditions of employment* . . . .

(emphasis added).

ure of legitimacy from the union duty to provide fair representation to its members as well as others in the bargaining unit.

Common sense and fundamental fairness rebel at the notion that a private organization can be prohibited from collecting expenses it incurs on behalf of nonmembers whom it is required by law to represent. In its most extreme formulation, such a proposition may even raise questions of a constitutional magnitude. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942) (defining "reasonable rates" in utility regulation as those that are "not confiscatory in the constitutional sense"). The burden of proof falls on those who suggest that section 14(b) reflects the adoption of such an extreme view by Congress,[18] and that burden has not been carried.

The NLRB dismisses the inequitable situation facing Local 681 by asserting that "the change must be made by Congress, not by the Board or this Court." Brief for Petitioner NLRB at 21. The suggestion is inappropriate because the problem has not been created by Congress. It is the courts, not Congress, that have required unions to expand their representational activities as collective bargaining and contract enforcement have grown in scope. It is the NLRB, not Congress, that has prohibited unions from collecting special fees from nonunion employees to cover the cost of their grievances and ar-

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[18] It is probable that Congress never considered this question at all, due to the evolution of collective bargaining in the years since the Taft-Hartley Act was passed. Before the duty of fair representation was elaborated by the courts, free riders did not directly harm unions but simply failed to benefit them. *See* pp. 4-5 *supra*. This point underscores the inequity of the view that the majority now ascribes to Congress. More important, it demonstrates the total lack of support for such a holding, because Congress could hardly have intended section 14(b) to govern tensions that did not yet exist.

bitrations. It does not usurp the role of Congress to hold section 14(b) to its terms. Nothing on the face of section 14(b) or in its legislative history allows the states to ban representation fee arrangements, because these arrangements do not constitute "compulsory unionism" or condition the right to work on loss of associational freedom. Section 14(b) was enacted to keep unions from victimizing workers, not to let nonunion workers victimize unions by demanding services without paying the costs. Section 14(b) gives the states only the authority to ban compulsory unionism. "Compulsory unionism under the Taft-Hartley Act thus has a very limited meaning." Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 68. As the Supreme Court observed in *International Bhd. of Teamsters v. NLRB*, 365 U.S. at 674: "There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act." The same concern should trouble those who read section 14(b) as allowing the states to prohibit valid representation fees.

## CONCLUSION

Section 14(b) expresses the policy of federal labor law, however controversial it may be. Organized labor traditionally opposes right-to-work laws, and seeks evisceration of section 14(b), but the unions may not be allowed to accomplish through litigation what they cannot obtain from Congress. By no account should my views be understood as urging an end run around the position that Congress has clearly taken.

But it seems equally injudicious for courts to ascribe to Congress a position that it has *not* taken, especially when doing so contravenes the balancing inherent in federal labor policy. The legislative history of section 14(b) utterly fails to support the majority's view of this case, and it seems irrefutable that the majority has misread

*Schermerhorn* and other judicial interpretations of that statute. By extending section 14(b) far beyond its terms, the majority turns a blind eye to the model of trade union democracy so clearly contemplated by Congress. The majority offers no reason, whether rooted in judicial precedent or legislative intent or sound policy, for such a result.

Trade union democracy as contemplated by Congress has and will require judicial interpretation that is sometimes complex, but the general principles are simple. Individual workers have certain rights and freedoms that must be protected from arbitrary union action; section 14(b) is one of the mechanisms that Congress intended to protect these rights. On the other hand, the union selected as the bargaining representative is the exclusive bargaining representative not just of the majority who support it, but of the entire bargaining unit. The union therefore has obligation and responsibilities even to non-union workers that lead to a "corresponding reduction in the individual rights of the employees so represented." *Vaca v. Sipes*, 386 U.S. at 182. Even in the states that have enacted laws pursuant to section 14(b), the mesh between unions and workers has grown tighter over the years whether that mesh is desired or not. It fully accords with the intent of Congress to take this fact into consideration when analyzing the scope of section 14(b). Workers who pay fees to cover the cost of their direct representation are not thereby transformed into members of the union because, as the Supreme Court has emphasized, "membership" means payment of dues and initiation fees that support the union's institutional expenses.

The model of trade union democracy with its problem of free riders traditionally suggests an analogy to military defense or police protection. Taxpayers receive these services whether they desire them or not, and are not permitted to reduce their taxes by the amount of "unwanted" service. The situation before us now is even

more striking; the better analogy is the taxpayer who not only declines to support the police department, but who demands that it send officers to check his home every day while he is away on vacation. Even in a right-to work state, nonunion employees cannot avoid union representation and frequently benefit directly from particular union efforts in their behalf. Letting unions recoup these costs of representation does not constitute coerced "membership" within the meaning of section 14(b). Because judicial precedent and sound policy support this conclusion, and the legislative history of section 14(b) does not foreclose it, I respectfully dissent.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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September Term, 1981

No. 80-2393

THE INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN, *et al.*,
*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

Argued: 10-29-81

Filed Jun. 2, 1982

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

### ORDER

Petitioners' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

*Per Curiam*

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wald, Mikva and Edwards would grant the suggestion for rehearing *en banc*.

## APPENDIX C

## UNITED STATES OF AMERICA
## BEFORE THE
## NATIONAL LABOR RELATIONS BOARD

Case 15—CB—1964

THE INTERNATIONAL UNION OF THE
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA,
LOCAL UNIONS NOS. 141, 229, 681 AND 706

and

INTERNATIONAL PAPER COMPANY,
SOUTHERN KRAFT DIVISION

## DECISION AND ORDER

On June 17, 1980, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of

[1] We agree with the Administrative Law Judge's conclusion of law that Respondents violated Sec. 8(b)(3) of the Act by insisting to the point of impasse upon the inclusion of a representation fee clause "which is a non-mandatory subject of bargaining by virtue

the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, The International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions Nos. 141, 229, 681 and 706, their officers, agents, and representatives, shall take the action set forth in the said recommended Order

Dated, Washington, D.C. September 30, 1980

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

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of any State Statute enacted pursuant to Section 14(b) of the Act proscribing such clause." The Administrative Law Judge, however, inadvertently failed to make a finding commensurate with this conclusion. Accordingly, we so find.

## APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 15-CB-1964

THE INTERNATIONAL UNION OF THE
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA,
LOCAL UNIONS NOS. 141, 229, 681 AND 706

and

INTERNATIONAL PAPER COMPANY,
SOUTHERN KRAFT DIVISION

*Lee J. Romero, Jr., Esq.*, of
New Orleans, LA, for the
General Counsel.

*Jerry L. Gardner, Jr., Esq.*
(*Barker, Boudreaux, Lamy,*
*Gardner & Foley*), of New
Orleans, LA, for the
Respondent.

*Michael Markowitz, Esq.*, of
New York, NY, for the
Charging Party.

### DECISION

#### Statement of the Case

BENJAMIN SCHLESINGER, Administrative Law Judge: This case was heard before me in New Orleans, Louisiana, on February 12, 1980. The unfair labor practice charge was filed on October 20, 1977, by International

Paper Company, Southern Kraft Division, and a complaint thereon issued alleging that International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and its Local Unions Nos. 141, 229, 681, and 706 (referred to collectively as "Respondents" or individually by their respective local numbers),[1] insisted to the point of impasse and conditioned the execution of any collective bargaining agreement upon the inclusion of a clause requiring employees to pay to the Respondents, as a condition of continued employment of the employees, a "representation fee," which General Counsel alleges is violative of "right-to-work" laws in Arkansas, Florida, Louisiana, and Mississippi, and have threatened to strike and picket International Paper's Natchez, Mississippi plant in furtherance of the bargaining demand. Respondents deny any violation of the Act, contending that the "representation fee" may be used only for the discharge of their obligations as representative of employees imposed by the Act, and that Section 14(b) of the Act does not authorize the four States to enact statutes prohibiting the collection of such "representation fees" as a condition of employment.

Upon the entire record in this proceeding,[2] including my observation of the witness and his demeanor and the

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[1] The complaint is not completely clear that the International is named as a separate party Respondent. However, because the clause contested herein was insisted upon by the International, a party to the collective bargaining agreement and negotiations, because the unfair labor practice charge named the International as well as its Locals, because the attorneys for the International were served with all pleadings, and because full relief would not be afforded if the International were not named, the International is treated herein as a Respondent.

[2] Much of the evidence presented herein was contained in a written stipulation of facts. In addition, oral testimony was presented by Respondents. General Counsel moved to correct the record in certain respects and, there having been no opposition interposed, the motion is granted and the record is corrected accordingly.

briefs filed by General Counsel and the Respondent, I make the following:

## Findings of Fact

### I. Jurisdiction

International Paper is a corporation duly organized under and existing by virtue of the laws of the State of New York, with offices and facilities located in Camden, Arkansas; Panama City, Florida; Springhill, Louisiana; and Natchez, Mississippi, where it is engaged in the manufacture, sale, and distribution of paper and related products. During the 12 months preceding the date of the complaint, a representative period, International Paper, in the course and conduct of its business operation, sold and shipped from each of its facilities, goods and materials valued in excess of $50,000 directly to points located outside each respective State. As a consequence, I find; as the parties have stipulated, that International Paper is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I further find, as Respondents admit, that they are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act, and have engaged in group bargaining with International Paper as representative of all pipefitters, their helpers and leadmen at the four plants—Local 706 (located at El Dorado, Arkasas), representing the Arkansas facility; Local 229 (located at Panama City, Florida), Florida; Local 141 (located at Shreveport, Louisiana), Louisiana; and Local 681 (located at Jackson, Mississippi), Mississippi.

## II. The Alleged Unfair Labor Practices

### A. The Facts

#### 1. The Respondents' Proposal and Negotiations

All of International Paper's facilities employed less than 50 pipefitters—the Louisiana plant employed the largest number of employees within the bargaining unit, 46 employees; the smallest was Arkansas, with only 29 employees. Even though the plants were located in "right-to-work" States, union membership was high, with the most obvious exception being in Mississippi, where Local 681's membership refused in 1974 to pay a yearly working assessment of 2 percent of wages, over and above monthly dues of $8.25; and membership declined from 38 to 1, the latter being the shop steward who by virtue of his position was not required to pay dues.

As a result of that condition [3]—a union which had no paying membership, yet which was required as collective bargaining agent to represent all of the members of the bargaining unit in negotiations and grievances—the Respondents proposed on May 24, 1977,[4] the first negotiating session for a new contract to replace the one expiring on May 31, that the clause providing for the payment of union dues be amended by providing

> . . . for an administrative fee or collective bargaining fee, for employees that elect not to be members of the contracting unit and, for whom there are no signed authorization checkoffs.
>
> The administrative fee or contract or representation fee, shall be the same as to which members of

[3] The other Locals did not have similar problems. All of the 46 and 37 employees represented by Local 141 and 229, respectively, continued to maintain their membership. Only two of the 29 employees represented by Local 706 refused to pay their dues.

[4] All dates refer to the year 1977, unless otherwise stated.

> the collective bargaining unit shall be obligated to pay under the constitution and bylaws of the bargaining unit for that mill.

International Paper's representatives immediately questioned the legality of this proposal, in view of the various States' prevailing "right-to-work" laws. Respondents, however, argued the fairness of their proposal, explaining that the Locals had a legal obligation to fairly represent all members of the bargaining unit, both dues-paying and non-members, and that particularly Local 681 had a financial obligation which it could not otherwise meet.

Negotiations continued in July and August, all the Respondent's initial proposals had been thoroughly negotiated, and agreement had been reached, save for the questioned "representation fee" proposal; and negotiations continued until December 8, when the parties finally executed an agreement, effective retroactively to June 1 and expiring by its terms on May 31, 1979, covering all of the terms and provisions of employment. The parties, by separate stipulation, left the question of the legality of the "representation fee" proposal for resolution in this proceeding.

In the meantime, on or about August 12, the Respondents amended their initial demand for a "representation fee," proposing as follows:

> Each employee covered by this agreement and represented in collective bargaining by the union, who is not now or who at anytime fails to become and remain a member of the union shall after 30 days and within 60 days after the date of this agreement or the date he drops out of the union, either directly or through assigned check-off, pay a pro rata service fee to the union which shall be less than monthly union dues to cover the cost of representation by the union. This fee shall be paid on a monthly basis and shall not in any way entitle the employees to the benefits and emoluments or subject him to the requirements

of union membership. The above clause shall apply to all employees hired while this agreement is in effect.

Employees who are union members in good standing shall not be required to make this payment. The Employer agrees that any employee who fails to pay timely within 5 days after the first of each month the monthly pro rata service fee shall be terminated by the company from his employment upon 10 days written notice given to said employee and to the company by the union.

This proposal constitutes a change from the May 24 proposal, which required non-members to pay an amount equal to union dues, to a "pro rata service fee . . . which shall be less than monthly union dues." Harry Rosenthal, Local 681's business manager, explained that this fee amounted to only the 2 percent working assessment which was part of Local 681's dues. Although the other three Locals had no significant problem with depletion of their membership and payment of expenses incurred in representing them, both Locals 141 and 706 explained that the representation fee they sought was the same as their members' dues.

Finally, by letter dated September 19, the Respondents' proposal was further refined, as follows:

The cost and expenses of representing all members of the bargaining unit, without regard to union affiliation or lack of same must be borne by all bargaining unit employees.

All bargaining unit employees who voluntarily chose to become members of the union shall be required to pay periodic dues, initiation fees and assessments uniformly required as a condition of acquiring or retaining union membership.

Those unit employees who voluntarily choose not to become union members shall be required to con-

tribute a pro rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. The representation fee will apply only when a collective bargaining agreement is in effect. Furthermore, in no case will the fee exceed the dues and assessments required of union members.

Failure of any *permanent* employee to make payment of the representation fee each month and to maintain the payments during employment under this agreement shall constitute grounds for dismissal after ten (10) days written notice to the employee and the company.

The amount of the representation fee will be based upon an independent audit to determine those services performed by the union directly related to the collective bargaining process. Upon receipt of the results of the audit the company will begin effective the following payroll period to check off the representation fee. The first payment will be due 31 days after the effective date of the agreement.

This clause will be effective in all states where subdivision (A) is prohibited by law.[5]

On September 28, International Paper rejected the Respondents' proposal, stating that: "Settled legal authority makes it clear that in the states of Arkansas, Louisiana, Florida and Mississippi all such clauses are versions of agency shop clauses and hence prohibited by the Right-To-Work laws of those states." Further negotiations in October to resolve the dispute proved unsuccessful; and

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[5] Subdivision (A) contained a union shop agreement, requiring permanent employees to become members of the "Union" (described as the International and all four Locals) not earlier than the 31st day and not later than the 37th day following the beginning of their employment, or the effective date of the agreement, whichever is later.

by letter dated October 17, Respondents gave notice of their intent to terminate the agreement because International Paper refused "to meet and bargain further or agree to a proposed representation fee." Respondents further advised that picketing would commence at the Mississippi plant on October 31. Upon receipt of Respondents' letter, or shortly after, International Paper filed the charge herein.

B. *Discussion*

General Counsel contends that the proposed "representation fee" clause is a non-mandatory subject of collective bargaining—and, as such, Respondents were not permitted to bargain upon it to impasse by virtue of State statutes [6]

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[6] The relevant statutes are as follows:

*Arkansas* STAT. ANN. §§ 81-201 - 81-205, entitled "Right to Employment." § 81-202 reads:

> Affiliation with or failure to join union as condition of employment prohibited.—No person shall be denied employment because of membership in, or affiliation with, a labor union; nor shall any person be denied employment because of failure or refusal to join or affiliate with a labor union; nor shall any person unless he shall voluntarily consent in writing to do so, be compelled to pay dues, or any other monetary consideration to any labor organization as a prerequisite to, or condition of, or continuance of, employment.

*Louisiana* REV. STAT. ANN. §§ 23:981-987 (West). Sections 983 and 984 state:

> Sec. 983. Freedom of choice.—No person shall be required, as a condition of employment, to become or remain a member of any labor organization, or to pay any dues, fees, assessments, or other charges of any kind to a labor organization.
>
> Sec. 984. Certain agreements declared illegal.—Any agreement, understanding or practice, written or oral, implied or expressed, between any employer and any labor organization in violation of the provisions of this Act is hereby declared to be unlawful, null and void, and of no legal effect.

or constitutional provisions[7] enacted under the authority of Section 14(b) of the Act[8] Respondents defend on the ground that Section 14(b) of the Act does not authorize States to prohibit the collection or assessment of necessary fees, expenses, or costs from non-union employees for the maintenance of legal obligations imposed upon the Respondents by virtue of their duty to bargain collectively for and fairly represent all employees within the bargaining unit.

## I. Section 8(a)(3)

No party argues that the proposed clause violates Section 8(a)(3) of the Act,[9] which makes it illegal for an

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[7] On June 22, 1960, the right-to-work amendment to Article VII of the Mississippi State Constitution went into effect by the adoption of MISS. CODE ANN. § 198-A, which reads in pertinent part as follows:

> Sec. 198-A. . . . No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

Article I, Section 6 of the Constitution of the State of Florida provides that the right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor organization. The State Supreme Court has held that the Constitution forbids agency shop clauses or agreements. *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (1962), aff'd 373 U.S. 746 (1963). In *Florida Education Association/United v. Public Employees Relations Commission*, 346 So. 2d 551 (1st Dist., Fla., 1971), an intermediate appellate court held that a "fair share fee for services" provision similar to the representation fee involved herein is an agency shop provision within the meaning of *Schermerhorn* and, accordingly, is prohibited by the Constitution of Florida.

[8] Section 14(b) provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[9] Section 8(a)(3) provides that it shall be an unfair labor practice for an employer:

employer to discriminate against employees "to encourage or discourage membership in any labor organization." Indeed, Respondents, without discussing the matter in their brief, assume the legality of their proposal under Federal law, while arguing that the proposed "representation fee" clause does not require *membership* in a union and this does not clash with the literal language of Section 14(b) permitting the States to prohibit agreements which require such membership.

It is clear that the Respondents' proposal is, as a matter of law, permitted by Section 8(a)(3). The Supreme Court, in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 737

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by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate collective-bargaining union covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

(1963), held that an agency shop, but rather requires payment of initiation fees and dues equal to that of members, to be nonviolative of Section 8(a)(3). In so doing, the Supreme Court found the agency shop proposal in General Motors to be the "practical equivalent" of membership. (373 U.S. at 743.) The respondent there further contended that, because the union's proposal did not require actual membership in a union, but only that fees and dues had to be paid, the clause was not saved by Section 8(a)(3)'s proviso. The Court answered, 373 U.S. at 742-743:

> This position, of course, would reject administrative decisions concerning the scope of § 8(3) of the Wagner Act, *e.g.*, *Public* Service Co. of Colorado, supra. [89 NLRB 418 (1950)] reaffirmed by the Board under the Taft-Hartley amendments, *American Seating Co.*, 98 NLRB 800.[8] Moreover, the 1947 amendments not only abolished the closed shop but also made significant alterations in the meaning of "membership" for the purposes of union security contracts. Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment

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[8] In that case, the Board stated:

> As to the requirement in paragraph 4 that religious objectors who do not become members pay to the Intervenor sums equivalent to dues, the Board has ruled that closed-shop agreements providing for "support money" payments did not violate the proviso to Section 8(3) of the Wagner Act. As the precise language of the 8(3) proviso in the Wagner Act was continued in the amended Act with certain added qualifications not pertinent here, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be "free riders," we find that the provision for support payments in the instant contract does not exceed the union-security agreements authorized by the Act. 98 N.L.R.B., at 802.

of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core. This Court has said as much before in Radio Officers Union v. Labor Board, 347 U.S. 17, 41:

> This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem which with-holding from unions the power to cause the discharge of employees for any other reason. . . ."

In *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336, U.S. 301, 307 (1949), a pre-Taft-Hartley Act case involving the validity of a maintenance of membership agreement under the then Section 8(3), the Supreme Court stated that that Section "merely disclaims a national policy hostile to the closed shop or *other forms of union-security agreement.*" (Emphasis supplied.) The Board long since has construed the proviso as shielding from an unfair labor practice charge less severe forms of union security arrangements. See, for example, *M. & J. Tracy*, 12 NLRB 916, 931-934 (1939); *J.E. Pearce Contracting and Stevedoring Co., Inc.*, 20 NLRB 1061, 1070-1073 (1940). The Supreme Court added, in *General Motors*, 373 U.S. at 741, that:

> There is much to be said for the Board's view that, if Congress desired in the Wagner Act to per-

mit a closed or union shop and in the Taft-Hartley Act the union shop, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union.

I conclude that the "respresentation fee" clause, demanding less adherence to the Respondents, is not the type of "compulsory unionism" or "union security" Congress sought to outlaw and is therefore permissible under Section 8(a)(3).

### 2. Permissive or Mandatory Subject of Bargaining

Section 8(d) of the Act requires that an employer and union representing its employees must ". . . bargain collectively . . . with respect to wages, hours, and other terms and conditions of employment." The Board has long held that "union security" is a condition of employment. *Andrew Jergens Co.*, 76 NLRB 363 (1948), enf'd 175 F.2d 130 (C.A. 9, 1949), cert. denied, 338 U.S. 827 (1949). The "representation fee" proposal in issue is a type of union security device that conditions continuing employment upon regular tender of such fee. I conclude, without considering the effect of the various State laws, that the representation fee clause is a mandatory subject of bargaining within the meaning of Section 8(d).

### 3. State Laws Enacted Pursuant to Section 14(b)

Even though the particular "representation fee" clause is lawful under Section 8(a)(3), General Counsel urges that such clause is still unlawful by virtue of either State statute or constitutional provision in each of the States in which the collective-bargaining agreement would apply. The agreement would be applicable at Respondent's facilities in Arkansas, Florida, Louisiana, and Mississippi, States in which "right-to-work" laws have been enacted.

Arkansas, Louisiana and Mississippi have in effect statutes which expressly prohibit agreements which require non-union members to pay dues, fees, assessments, or any other form of monetary consideration to any kind of labor organization as a condition of employment. Clearly, in these States, any fee such as one proposed by Respondents is prohibited. Florida's constitutional provision, although not specifically outlawing any required payments to a labor organization, has been construed to prohibit both the agency shop and a "fair share" requirement,[10] equivalent to the pro rata share requirement proposed by Respondents. I agree with General Counsel that the proposed "representation fee" clause is violative of State laws enacted pursuant to Section 14(b), in each of the States involved.[11]

Turning to Respondents' claim that Section 14(b) of the Act does not authorize the States to pass laws which prohibit the collection of any amount based solely on the labor organization's cost of servicing bargaining unit employees, the answer is less apparent. In Retail Clerks International Association, Local 1625 v. Schermerhorn, 373 U.S. 746, the union and employer had agreed upon a provision requiring all employees who chose not to join the union to pay to the union, as a condition of employment, an initial service fee and monthly service fees for the purpose of aiding the union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent. The service fee was "admittedly the exact equal of membership initiation fees and monthly dues," 373 U.S., at 753; and the Court found that there was no difference between the clause in dispute, which it found to fall within the purview of Florida's

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[10] See footnote 7, supra.

[11] Respondents do not suggest a contrary result. Cf., *United Steelworkers of America, AFL-CIO (Midland Rose Corporation)*, 199 NLRB 153 (1972).

"right-to-work" constitutional provision and thus illegal, and the agency-shop clause in *General Motors*, which it found legal under Section 8(a)(3) of the Act.

The more difficult question presented herein is the relationship between Section 8(a)(3) and 14(b), a matter left open in Retail Clerks v. Shermerhorn, 373 U.S., at 751-752, where the Court wrote:

> . . . § 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. And it was the proviso to § 8(a)(3), expressly permitting agreements conditioning employment upon membership in a labor union, which Congress feared might have this result. It was desired to "make certain" that § 8(a)(3) could not "be said to authorize arrangements of this sort in States where arrangements were contrary to the State policy." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. L.M.R.A. 564.
>
> The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. At the very least, the agreements requiring "membership" in a labor union which are expressly permitted by the proviso are the same "membership" agreements expressly placed within the reach of state law by § 14(b). It follows that the *General Motors* case rules this one, for we there held that the "agency shop" arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8(a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the "practical equivalent" of an "agreement requiring membership in a labor organization as a condition of employment." Whatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b). At

least to that extent did Congress intend § 8(a)(3) and § 14(b) to coincide. (Footnote omitted.)

The issue herein, then, is whether Section 14(b) and 8(a)(3) are coincident to the extent that even a service fee clause requiring a non-member to pay to the Respondents less than normal dues,[12] may be barred by the State statutes and constitutional provisions. The answer, in turn, depends upon what Congress meant by the terms, "union security" and "compulsory unionism," which Congress in 1947 sought to remove entirely from federal preemption and to permit as subjects of State action.

The 1947 amendments, known as the Taft-Hartley Act, had their genesis in H.R. 3020, introduced by Representative Hartley in the 80th Congress, First Session. In relevant part, H.R. 3020 banned the closed shop provisions (by which all employees must be members of a union in order to obtain employment) only if the employees had selected the union by secret ballot and if a majority of the employees had authorized the union to enter into such an agreement. No strike was permitted to compel such agreement, which in any event might be entered into only "if the agreement is not prohibited by State law." H.R. Rep. No. 245, 80th Cong., 1st Sess. 9, 1 Leg. Hist. L.M.R.A. 300.

In its "Analysis of Provisions," the Report noted that: "While the bill abolishes the closed shop, it permits . . .

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[12] It is unclear what amount non-member employees would be required to pay. At the bargaining table, Rosenthal maintained that they would pay 2 percent of their earnings, an amount which exceeded Rosenthal's computations, apparently prepared for this proceeding and never discussed at the bargaining table, of the pro rata share due under the September 19 proposal. Two of the other Locals merely stated that their service fee was the equivalent of membership dues. The posture assumed by these two Locals was contrary to the teaching of *Retail Clerks v. Schermerhorn*. However, the complaint places at issue only the validity of the last of Respondent's proposals and does not rely upon the bargaining history; and I limit this decision to that issue.

such forms of compulsory unionism as the union shop and maintenance of membership." However, those agreements are valid "only if they are valid under the laws of any State in which they are to be performed," and by the predecessor to Section 14(b) as enacted, "the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, . . . *notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law.*" H.R. Rep. No. 245, p. 34, 1 Leg. Hist. L.M.R.A. 325; emphasis supplied.

Similarly, Senate Committee Report No. 105 recognized, at page 6, 1 Leg. Hist. L.M.R.A. 412, that in 1935, when Congress reported the bill which became the National Labor Relations Act, Congress ". . . made clear that the proviso in Section 8(3) [the predecessor to Section 8(a)(3)] was not intended to override State laws regulating closed shops." Senator Taft, presenting the Senate Conference Report during open Senate debate, noted that a new subsection had been added to Section 14, namely Section 14(b), to make it "perfectly clear that nothing in the act is to be construed as authorizing compulsory union membership agreements, in States where the execution or enforcement of such agreements would be contrary to State law," adding that many States had enacted laws or adopted constitutional provisions "to make all forms of compulsory unionism in such States illegal" and that it was not the intent to deprive the States of such power. 93 Cong. Rec. 6602, 2 Leg. Hist. L.M.R.A. 1543.

When the House Conference reported on Section 14(b), H.R. Conf. Rep. No. 510, p. 60, 1 Leg. Hist. L.M.R.A. 564, it noted that it had included a new Section 13 (its predecessor to Section 14(b)) "to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the

execution of such agreement would be contrary to State law." It added: "It was never the intention of the National Labor Relations Act . . . to deprive the States of their powers to prevent compulsory unionism. . . . To make certain that there should be no question about this," the Conference agreement noted that Section 14(b) "contains a provision having the same effect."

H.R. 3020, as amended in conference, finally passed both Houses of Congress, but President Truman vetoed the bill on June 20, 1947, noting with reference to Section 14(b) that:

> [I]n one important area the bill expressly abandons the principle of uniform application of national policy under Federal law. The bill's stated policy of preserving some degree of union security would be abdicated in all States where more restrictive policies exist. In other respects the bill makes clear that Federal policy would govern insofar as activities affecting commerce are concerned. This is not only an invitation to the States to distort national policy as they see fit, but is a complete forsaking of a long-standing constitutional principle. 93 Cong. Rec. 7503, 1 Leg. Hist. L.M.R.A. 920-921.

It thus appears that both proponents and opponents fully understood that the scope of Section 14(b) granted to the States the power to enact legislation covering the breadth of compulsory unionism. Union security would be "abdicated in all States where more restrictive policies exist." "[O]ther form[s] of compulsory unionism," in addition to closed shops, union shops, and maintenance of membership, could be contrary to State law; and "all forms of compulsory unionism" could be made illegal. Indeed, Congress was aware that by 1947, 12 States had made compulsory union agreements illegal and in 14 other States, proposals for abolishing such contracts were then pending. S.Rep. No. 105, p. 6, 1 Leg. Hist. L.M.R.A.

412; H.R. Rep. No. 245, p. 34, 1 Leg. Hist. L.M.R.A. 325. Included in the 12 States were Arkansas, involved herein; Georgia, GA. COD ANN, § 54-904; and Tennessee, TENN, CODE ANN. § 50-210—each of which had legislated against any payment to a union by an employee as a condition of his employment. There is nothing to demonstrate that such a broad prohibition by States had not been contemplated by Congress when it enacted Section 14(b) of the Act.

Union security and compulsory unionism have as their object a forced adherence of an employee to the union.[15] The Respondents herein sought pro rata payments to them as a condition of employment of non-members. That was as much a "financial core" of compulsory unionism to non-members, *N.L.R.B. v. General Motors Corp.*, 373 U.S. at 742, as was payment of full dues and initiation fees by Respondents' members.[14]

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[13] Union security clauses have been defined as "[c]ontract provisions requiring employees to become or remain union members under certain circumstances, or to pay the union a fee for serving as their bargaining agent." Bureau of National Affairs, *Labor Relations Expeditor*, p. 835 (1980).

[14] Respondents' contentions raise the additional question of whether a "representation fee" clause may be declared valid solely because a union does not expend the equivalent of members' dues. There are many times that a union is so involved in lengthy negotiations, critical grievances, and litigations that it must expend monies in excess of its dues receipts. *Query*, whether a "representation fee" clause, valid under Respondents' analysis because their expenses were less than dues, becomes invalid once expenses approach or exceed members' dues so that the effect of the clause "is the same as the *General Motors* agency shop arrangement." *Retail Clerks v. Schermerhorn*, 373 U.S., at 754. Indeed, under Respondents' proposal, which states that "in no case will the fee exceed the dues and assessments required of union members," there is the possibility that a non-member may lose employment because he did not pay more than "periodic dues and . . . initiation fees," the limit permitted by Section 8(a)(3). Peerless Took and Engineering Co., 111 NLRB 853 (1955), enf'd 231 F.2d 298 (C.A. 7, 1956), cert. denied 352 U.S. 833 (1956).

Respondents' argument—that their "representation fee" clause is valid because such fees are necessary for them to meet their duty to fairly represent all employees, both union members and non-members—misses the point. It is entirely accurate, as Respondents contend that the Supreme Court has often noted the paramount importance of the duty of fair representation to the Federal labor law, *Vaca v. Sipes*, 386 U.S. 171 (1967); *International Association of Machinists*, 367 U.S. 740 (1961); and that meeting this duty often entails "expenditure of much time and money." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977).

If the Congress was unaware of the duty of fair representation, it certainly knew that in the absence of union security provisions, "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." However, even with the knowledge that unions have a duty to bargain under Section 8(b)(3) of the Act, the Congress compromised the issue of permissible union security provisions under the Act.

As noted, *supra*, the amendment to Section 8(a)(3) was intended to remedy serious abuses of the closed shop while permitting the elimination of "free riders" after 30 days' employment. "As far as the federal law was concerned, all employees could be required to pay their own way." *N.L.R.B. v. General Motors Corp.*, 373 U.S., at 741. However, the cession to the States of power to enact their own legislation limiting "compulsory unionism more drastically then does federal law" was a deliberate judgment of Congress to permit the States to make their own judgment on the issue of "free riders."

I do not suggest that there is no justification for the Respondents' "free rider" argument. Not only are Respondents required to render services to all employees, at great expense; but also, if they do not render such services, they may be held liable for damages. Yet, I recognise

that under this Decision, in the four States, they have no power to force the employees who reap the benefits of representation to contribute their fair share to enable Respondents to perform the functions they are legally required to perform.

However, Respondents fail to recognize that they became the exclusive collective-bargaining representative not because of any inherent and inalienable right. Rather, their status was determined by the exercise by International Paper's employees of their right to self-organization under Section 7 of the Act. If those employees sought Respondents' aid as exlusive representative, but withheld financial support so that Respondents could not afford to carry out their legal responsibilities, except at their own expense, then Respondents might merely disclaim any interest in representing those employees.

Obviously, the "right-to-work" laws merely make more difficult a union's task of ensuring the adherence of employees, because their jobs may not be jeopardized if they refuse such financial support. This is not to say that, under Federal law, in non-"right-to-work" States, the same situation may not apply. The first proviso to Section 8(a)(3) permits employees to rescind the authority of a labor organization to enter into a union security clause, and if the employees do so, a labor organization is placed in the same dilemma that it always faces in a "right-to-work" State—where to obtain sufficient assets to pay for its obligations. That is the practical problem Respondents pose in this proceeding; but it is a problem previously considered by Congress and rejected.

Although the issue presented in this proceeding has never been decided by the Board, two related decisions lend support to the conclusion I have reached. In Hughes Tool Company, 104 NLRB 318 (1953), a union in a "right-to-work" State attempted to protect the dues paid by its members by charging non-members a service fee

for pursuing grievances and arbitration. The Board wrote, at page 329:

> The Independent is barred, by the law of the State of Texas, from obtaining compulsory membership. We do not believe that, in the alternative, it may require a fee from nonmember employees for services which are due the latter as a matter of right. By adopting such a procedure, the Independent has, in effect, taken the position that it will only represent its members in the important area of contract administration.

In *International Association of Machinists and Aerospace Workers, Local Union No. 697, AFL-CIO (The H. O. Canfield Rubber Company of Virginia, Inc.)*, 223 NLRB 832 (1976), the union was charged with a violation of Section 8(b)(1)(A) for failing and refusing to arbitrate grievances of a non-member unless the employee paid the cost of arbitration. The union contended that doing so was reasonable and necessary to protect dues paid by its members from being eroded by expenditures to protect non-members and argued that it must be able to protect itself from "freeriders." The Board concluded that the union, "by charging only nonmembers for grievance representation, has discriminated against nonmembers. We further find that a grievance procedure is vital to collective bargaining and that grievance representation is due employees as a matter of right. To discriminate against nonmembers by charging them for what is due them by right restrains them in the exercise of their statutory rights." 223 NLRB at 835.

Faced with these decisions, Respondents argue merely that they are incorrect and should be summarily reversed. That argument, of course, is more properly addressed to the Board, since the powers of an Administrative Law Judge are limited "to apply established Board precedent which the Board or the Supreme Court has not reversed." See, e.g., *Capitol Foods, Inc. d/b/a Schulte's* IGA Food-

liner, 241 NLRB 855 (1979). Applying Board law, I conclude that Respondents' "representation fee" clause would permit them to charge for grievances and for collective bargaining which is due non-member employees as a matter of right and would violate Section 8(b)(1)(A) of the Act. The clause is, therefore, a non-mandatory subject of bargaining; and Respondents violated Section 8(b)(3) by insisting upon its inclusion in a collective-bargaining agreement.

### III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents, set forth in Section II above, occurring in connection with International Paper's operations, described in Section I above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and lead to labor disputes burdening and obstructing commerce and the free flow thereof.

### Conclusions of Law

1. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. International Paper is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By refusing to bargain in good faith with International Paper by insisting to a point of impasse, as a condition of reaching any collective-bargaining agreement with International Paper, upon the inclusion of a representation fee clause or any other similar fee which is a non-mandatory subject of bargaining by virtue of any State statute enacted pursuant to Section 14(b) of the Act proscribing such clause and by threatening to strike and/or picket facilities of International Paper in further-

ance of bargaining demands for inclusion of a non-mandatory subject of bargaining in a collective-bargaining agreement, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(b) and (7) of the Act.

## The Remedy

Having found that the Respondents violated Section 8(b)(3) of the Act, I shall order the Respondents to cease and desist therefrom.

Normally, I would also recommend that Respondents affirmatively bargain in good faith. However, General Counsel has not requested such relief, which, I agree, is unwarranted because none of the International Paper's four facilities are presently represented by Respondents, as a result of sales, change of operations, or decertifications. No party claims, however, that this proceeding is moot: all of Respondents are still viable organizations, and International Paper still operates its Arkansas and Mississippi facilities. A notice to employees will, therefore, serve as important function in effectuating the purposes of the Act.[15]

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[15] International Paper has another facility at Vicksburg, Mississippi. The employees are represented by the International and its Local Union No. 619. A similar issue has been raised in collective-bargaining negotiations there; and the parties entered into an agreement covering all terms and conditions of employment, but preserved the demand for a "representation fee" pending the outcome of this proceeding.

## ORDER [16]

The Respondents, the International Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and Local Unions Nos. 141, 229, 681, and 706, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with International Paper Company, Southern Kraft Division, by insisting to a point of impasse, as a condition of reaching any collective-bargaining agreement with International Paper, upon the inclusion of a representation fee clause or any other similar fee which is non-mandatory subject to bargaining by virtue of any State statute enacted pursuant to Section 14(b) of the Act proscribing such clause.

(b) Threatening to strike and/or picket facilities of International Paper in furtherance of bargaining demands for inclusion of a non-mandatory subject of bargaining in a collective-bargaining agreement.

(c) In any like or related manner refusing to bargain collectively with International Paper by insisting upon the inclusion in a collective bargaining agreement of provisions or proposals not related to wages, hours, and other terms or conditions of employment.

2. Take the following affirmative action to remedy the unfair labor practices found herein and to effectuate the policies of the Act:

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[16] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Post at Respondents' business offices and meeting halls, copies of the attached notice marked "Appendix." [17] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, at the International's and each Local's office, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 15, sufficient copies of said notice, on forms provided by him, for posting at the premises of International Paper, if the latter is willing.

(c) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D.C. June 17, 1980

BENJAMIN SCHLESINGER
Administrative Law Judge

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[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATION BOARD."

## APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-168

INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, ETC.,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 1982

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 24th
day of August, 1982

## APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-168

INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, ETC.,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

---

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including October 30, 1982

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 10th
day of October, 1982

Office-Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-751

# In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether, under Section 14(b) of the National Labor Relations Act, the states may prohibit representation fee clauses in collective bargaining agreements that compel employees who are not members of a union to pay a fee equal to their pro rata share of the cost of enforcing and servicing a collective agreement when such a share may be equal in amount to the dues and assessments required of union members.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-751

INTERNATIONAL UNION OF THE UNITED ASSOCIATION OF JOURNEYMEN, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 675 F.2d 1257. The decisions and orders of the National Labor Relations Board (Pet. App. 55a-56a) and the Administrative Law Judge (Pet. App. 57a-82a) are reported at 252 N.L.R.B. 1299.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. A petition for rehearing en banc was denied on June 2, 1982 (Pet. App. 54a). The Chief Justice extended the time for filing a petition for a writ of certiorari to and

including October 30, 1982 (Pet. App. 83a-84a), and the petition was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3. The relevant provisions of the state laws involved in this case are set forth at Pet. 5 n.1.

## STATEMENT

1. Petitioners represented the employees at four mills operated by International Paper Company, Southern Kraft Division ("the Company") (Pet. App. 58a-59a).[1] All of the employees at the Louisiana and Florida mills and most of the employees at the Arkansas mill were members of the respective local unions serving those mills (*id.* at 60a n.3). However, when Local 681 at the Natchez, Mississippi mill sought to require the employees to pay a yearly working assessment of 2% of their wages in addition to their monthly dues, they all resigned from that local, with the exception of the shop steward, who was not required to pay dues (*id.* at 60a).

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[1]The four mills, and the local representing the unit employees at each, were as follows: Springhill, Louisiana - Local 141; Panama City, Florida - Local 229; Natchez, Mississippi - Local 681; and Camden, Arkansas - Local 706.

Petitioners no longer represent the employees at the four mills in question (Pet. App. 80a). However, the Board and the court of appeals concluded that the case was not moot, since a dispute over the same issue had arisen at the Company's Vicksburg, Mississippi mill, where the employees are still represented by another local of the same international union (*id.* at 80a n.15; see also *id.* at 17a n.3 (dissenting opinion)). See generally *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 216 n.9 (1977).

The parties' collective bargaining agreement expired in May 1977. At the outset of negotiations for a new contract, petitioners proposed a clause requiring all non-members to pay a representation fee equal to the dues paid by members. The Company objected on the ground that such a clause would violate the "right-to-work" laws of the four states (Pet. App. 60a-61a). The parties eventually reached agreement on all other contract proposals. In August, petitioners proposed that the disputed clause require all non-members to "pay a pro rata service fee * * * which shall be less than monthly union dues" (*id.* at 61a). However, two of the locals stated that their representation fees would be equal to the dues paid by their members, and the representative of Local 681 stated that its fee would be equal to the 2% assessment which the Natchez employees had sought to avoid by resigning from union membership (*id.* at 61a-62a). Petitioners then changed their proposed clause again, to state that non-members "shall be required to contribute a pro rata share of the costs and expenses incurred by the union that are directly related to enforcing and servicing the collective bargaining agreement. * * * [I]n no case will the fee exceed the dues and assessments required of union members" (*id.* at 62a-63a). The Company rejected this clause as well, on the ground that it was contrary to state "right-to-work" laws (*id.* at 63a).

By letter dated October 17, 1977, petitioners announced that they were terminating the contract because of the Company's refusal to agree to a representation fee, and that picketing at the Natchez mill would begin on October 31 (Pet. App. 64a). The parties subsequently executed a new contract, with petitioners reserving the right to demand further negotiations on the proposed representation fee if it were found lawful (*id.* at 61a).

2. The Board, upholding the decision of the Administrative Law Judge, found that the proposed representation fee provision was a union-security clause authorized by the proviso to Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) and that, absent state "right-to-work" laws, such a clause would be a mandatory subject of bargaining (Pet. App. 66a-69a). However, the Board further found that the proposed clause would violate the "right-to-work" laws of each of the four states in question, and that Section 14(b) of the Act (29 U.S.C. 164(b)) authorized the states to prohibit such clauses (Pet. App. 69a-77a).

Thus, the Board noted that "Arkansas, Louisiana and Mississippi have in effect statutes which expressly prohibit agreements which require non-union members to pay dues, fees, assessments, or any other form of monetary consideration to any kind of labor organization as a condition of employment" and Florida's law has been judicially construed to the same effect (Pet. App. 70a). The Board also noted (*id.* at 74a-75a) that the Arkansas law involved here and similar laws in several other states had been in existence when Congress enacted Section 14(b) in 1947. The Board concluded that "[t]here is nothing to demonstrate that such a broad prohibition by States had not been contemplated by Congress when it enacted Section 14(b) of the Act" (Pet. App. 75a). Rather, it "appears that both proponents and opponents fully understood that the scope of Section 14(b) granted to the States the power to enact legislation covering the breadth of compulsory unionism" (*id.* at 74a).

Accordingly, the Board concluded that the clause at issue here was a non-mandatory subject of bargaining and that petitioners therefore violated Section 8(b)(3) of the Act (29 U.S.C. 158(b)(3)) by insisting to the point of impasse on inclusion of the clause in the collective bargaining agreement (Pet. App. 55a-56a n.1, 79a).

3. A divided court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-53a). The court concluded that "the legislative history of § 14(b) supports the position of the Board" (Pet. App. 8a). It noted that Congress was aware of the existence of state laws that had outlawed contract provisions such as that at issue here and it pointed out that "[t]he Mississippi statute at issue here is almost identical to the Georgia statute * * *, which Congress practically incorporated by reference into the legislative history of § 14(b)" (*id.* at 6a).

The court added that "Congress also knew about the free rider problem posed by such laws," but sanctioned them anyway (Pet. App. 6a-7a). Addressing the complaint of the Union and the dissenting judge[2] that "free riders pose more of a burden today than they did when § 14(b) was enacted," the court concluded (*id.* at 10a-11a; footnote omitted) that

> that argument is better addressed to Congress than to this court. A state law valid under § 14(b) in 1947 is valid today, and there is no serious question but that Congress in 1947 intended laws like Mississippi's to survive federal preemption. Moreover, on the facts of this case Mississippi's right-to-work law protects precisely those liberties Congress allowed the states to preserve. The men at the Natchez plant once belonged to the Union. They fled the Union when it raised its tax

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[2]Judge Mikva, dissenting below, viewed the legislative history as showing only an intent to permit states to ban clauses, such as closed shop or union shop agreements, requiring union membership (Pet. App. 23a-37a). In his view, the proposed representation fee would not require "membership" within the meaning of Section 14(b) (Pet. App. 38a-51a).

upon their labor. * * * This is precisely the "compulsory unionism" Congress had in mind when it passed § 14(b), and this is the core of membership the Supreme Court has interpreted § 14(b) to encompass.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court. Accordingly, review by this Court is not warranted.

1. The proviso to Section 8(a)(3) of the Act permits an employer and a union, under certain conditions, to enter into an agreement requiring membership in a union as a condition of employment. See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 745 (1963). However, Section 14(b) of the Act states: "Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In *Retail Clerks International Association, Local 1625* v. *Schermerhorn*, 373 U.S. 746 (1963), this Court refused to limit state power under Section 14(b) of the Act to the prohibition of agreements requiring actual union membership as a condition of employment. The Court explained (373 U.S. at 751):

> The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. At the very least, the agreements requiring "membership" in a labor union which are expressly permitted by the proviso are the same "membership" agreements expressly placed within the reach of state law by § 14(b).

Noting that, in the companion case, *NLRB* v. *General Motors Corp., supra,* it had held that the proviso to Section 8(a)(3) permits the conditioning of employment upon payment of union dues and initiation fees, and not only upon actual union membership, the Court concluded that Section 14(b) must similarly be interpreted as allowing the states to prohibit agreements requiring such payments as well as agreements requiring actual union membership. However, the Court left open "the status of less stringent union-security arrangements * * *." *Schermerhorn, supra,* 373 U.S. at 751-752.

Petitioners contend (Pet. 9) that their proposed union-security provision "is entirely distinct from the *Schermerhorn* clause." The Board reasonably concluded that the proposed provision cannot meaningfully be distinguished from that in *Schermerhorn.*

Thus, both the Board (Pet. App. 75a n.14) and the court of appeals (*id.* at 11a n.8) found that the clause could require the covered employees to pay an amount equal to the regular dues structure, which was exactly what was required in *Schermerhorn.*[3] For, while Local 681 stated that its fee would equal the 2% assessment which the Natchez employees sought to avoid by resigning, the proposed clause involved here provides only that the "representation fee" is not to "exceed the dues and *assessments* required of

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[3]The clause in *Schermerhorn,* like the one proposed here, did not by its terms require the payment of "dues and initiation fees"; rather, it required non-members to pay "an initial service fee and monthly service fees to the [u]nion for the purpose of aiding the [u]nion in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit." 373 U.S. at 748. The service fees were not to exceed the dues and initiation fees paid by members, and non-members would have no further financial obligations to the union. *Id.* at 749.

union members" (Pet. App. 63a; emphasis added). As the Board pointed out (*id.* at 75a n.14), if petitioners' representation expenses were to exceed their receipts from dues and "representation fees" — which could easily happen if, for example, they had a number of expensive arbitrations — petitioners could require non-members to pay not only the equivalent of dues, but also the equivalent of assessments, which might well exceed the amount of dues[4] and which may not be required as a condition of employment even in a non-"right-to-work" state.[5]

Moreover, the proposed provision suffers from the same infirmity noted by the Court in *Schermerhorn* (373 U.S. at 753-754) — viz., even if all of the funds collected from non-members were used solely in payment of bargaining expenses, the non-members would nevertheless end up subsidizing the union's institutional activities. Thus, in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237 n.35 (1977), the Court, relying on *Schermerhorn*, stated that "[i]t is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to

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[4]Petitioners contend (Pet. 9) that the proposed non-member representation fee would necessarily be less than members' dues except in "the entirely unlikely event that the independent audit showed the union to have no expenses other than those attributable to enforcing and servicing the collective agreement * * *." That statement is not correct. Petitioners apparently assume that under its proposal members and non-members alike will pay a pro rata share of *actual* collective bargaining costs and members will pay an additional amount for institutional expenses. There is no evidence, however, that members' dues and fees fluctuate with actual expenses. Accordingly, should the pro rata share of the *actual* cost of servicing the contract equal or exceed the pre-set members' dues and fees, non-members might be required to pay the same amount as members.

[5]See *Peerless Tool and Engineering Co.*, 111 N.L.R.B. 853, 871 (1955), enf'd *sub nom. NLRB* v. *Die and Tool Makers Lodge No. 113*, 231 F.2d 298 (7th Cir.), cert. denied, 352 U.S. 833 (1956); *NLRB* v. *Food Fair Stores, Inc.*, 307 F.2d 3, 11-16 (3d Cir. 1962).

collective-bargaining purposes. '[Such a limitation] is of bookkeeping significance only rather than a matter of real substance.' " Indeed, even the dissenting judge below acknowledged (Pet. App. 47a n.16) that under the proposed clause

> once a union receives a pro rata share of collective bargaining costs from nonunion employees, monies in the union treasury that had formerly been used to represent those employees will be freed up to pay other, institutional expenses of the union.

2. The legislative history of the Act supports the Board's position that the proposed clause at issue here cannot meaningfully be distinguished from that in *Schermerhorn* for purposes of coverage under Section 14(b) of the Act. Thus, as both the Board (Pet. App. 74a-75a) and the court of appeals (*id.* at 6a-7a) pointed out, when Congress enacted Section 14(b), it specifically noted and did not disapprove state laws that prohibited assessments identical to those involved here.[6]

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[6]The House Report specifically mentioned 12 states as having "right-to-work" laws, four others as allowing union-security clauses only after employee votes, and 14 other states as having "right-to-work" laws under consideration. 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 325 (1948) ("*Legis. Hist. LMRA*"). Three of the 12 states mentioned as having enacted "right-to-work" laws (Arkansas, Georgia, and Tennessee) expressly prohibited compulsory payments to, as well as compulsory membership in, unions. The Arkansas statute cited in the legislative history is involved in this case and is set forth at Pet. 5 n.1. The Georgia statute (Ga. Code § 54-903 (1982)), enacted March 27, 1947, reads: "No individual shall be required as a condition of employment, or of continuation of employment, to pay any fee, assessment, or other sum of money whatsoever, to a labor organization." The Tennessee statute (now codified at Tenn. Code Ann. § 50-210 (1977)) makes it unlawful to exclude any person from employment for "payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind." Three more states, two of which were mentioned in the House Report as

Petitioners rely (Pet. 10-11) on the assertion of the dissenting judge below (Pet. 36a) that "the legislative history does not suggest that Congress knew these [state] laws sometimes prohibited payment of 'any dues, fees or charges of any kind to any labor union' * * *." The dissent offers no basis for this statement. Indeed, the evidence is to the contrary. Thus, the Senate Conference Report explained: "Many States have enacted laws or adopted constitutional provisions to make *all forms of compulsory unionism* in such States illegal" and, "[a]s stated in the report accompanying the Senate committee bill, it was not the intent to deprive the States of such power." 2 *Leg. Hist. LMRA* at 1543 (emphasis added). The House Conference Report contained similar language and added that the House provision, adopted in substance by the conference, was designed "to assure that nothing in the [A]ct was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law." 1 *Leg. Hist. LMRA* at 564 (emphasis added). Nothing in the legislative history indicates that Congress was unaware of the substance of the state "right-to-work" laws it cited or that it intended to preserve only those state laws that banned actual compulsory membership in unions while nullifying those laws that banned compulsory payments of the scope involved here. As this Court has stated, "Congress seems to have been well informed [about state right to work laws] during the 1947 debates * * *." *Retail Clerks International Association, Local 1624* v. *Schermerhorn*, 375 U.S. 96, 100 (1963).

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having "right-to-work" laws under consideration, enacted similar laws before the final passage of the Taft-Hartley Act on June 23, 1947. See N.C. Gen. Stat. § 95-82 (1981) (enacted March 18, 1947); Iowa Code § 731.4 (1979) (enacted May 1, 1947); Tex. Rev. Civ. Stat. Ann. art. 5207a (Vernon 1971) (enacted April 8, 1947).

3. Petitioners' reliance (Pet. 12-13) on cases[7] holding that a union operating an exclusive hiring hall may charge non-members a service fee for the use of the hiring hall is unavailing. A union is under no obligation to operate a hiring hall; since it could refuse to refer anyone — member or non-member — for employment, it may also require that anyone it does refer shall pay for the use of the referral service — members through their dues and non-members through a fee. Here, in contrast, petitioners sought, by their proposal for a "representation fee," to charge non-members in their bargaining units for services that an exclusive bargaining representative is required by law to provide for all unit employees. The instant case thus is analogous to *IAM, Local 697, (H.O. Canfield Rubber Co.)*, 223 N.L.R.B. 832, 834-835 (1976), in which the Board, reaffirming its earlier decision in *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953), held that a union barred by a state "right-to-work" law from requiring employees to become members could not require non-members to pay the cost of processing their grievances, since grievance representation was due them as a matter of right. The Board rejected the union's argument that it was only seeking to protect itself from "free riders," pointing out that in *Hughes Tool* it had held that state "right-to-work" laws could not be evaded by requiring non-members to pay a fee for services due them as a matter of right, and that doing so was equivalent to representing only members in the grievance procedure.

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[7] *Local 825, International Union of Operating Engineers*, 137 N.L.R.B. 1043 (1962); *Local 1351, Steamship Clerks and Checkers* v. *NLRB*, 329 F.2d 259, 262 (D.C. Cir.), cert. denied, 377 U.S. 993 (1964); *NLRB* v. *Local 138, International Union of Operating Engineers*, 385 F.2d 874, 875-876 (2d Cir. 1967), cert. denied, 391 U.S. 904 (1968).

4. Finally, petitioners contend (Pet. 7-8, 9-10) that denial of the right to charge non-members in "right-to-work" states for services that the exclusive bargaining representative is required by law to perform will impose an undue financial burden on unions and impair performance of their statutory duties by allowing "free riders". As the court of appeals correctly observed (Pet. App. 10a), however, this contention is directed to the wrong forum. The legislative history of the 1947 amendments clearly shows that Congress was aware of the problem of "free-riders." See 1 *Leg. Hist. LMRA* at 412, 741. Congress nevertheless enacted Section 14(b) of the Act and thereby permitted the states to enact laws that have the effect of perpetuating the "free rider" problem. If a change of policy is necessary because the duty of fair representation has imposed burdens on unions not contemplated by Congress in 1947, such a change is for Congress (or the state legislatures), not this Court, to make. See *Abood* v. *Detroit Board of Education, supra,* 431 U.S. at 225 n.20; *Railway Employees' Department* v. *Hanson,* 351 U.S. 225, 233-234 (1956).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General*

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DECEMBER 1982

DOJ-1982-12